

THE
L I F E

OF

HON. NATHANIEL CHIPMAN, LL.D.

FORMERLY

MEMBER OF THE UNITED STATES SENATE, AND CHIEF
JUSTICE OF THE STATE OF VERMONT.

WITH

SELECTIONS

FROM HIS MISCELLANEOUS PAPERS.

BY HIS BROTHER,

DANIEL CHIPMAN.

BOSTON:

CHARLES C. LITTLE AND JAMES BROWN.

1846.

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P R E F A C E .

ALTHOUGH it might be supposed that the death of my brother, at his advanced age, would not surprise or deeply affect any one, yet, as we had been the only survivors of a numerous family, and as he had now left me the only survivor, the intelligence of his death produced a shock, which I had not anticipated. I felt a depressing, lonely feeling, which I will not undertake to describe ; and I at once resorted to the numerous letters which had passed between us, and spent the day in reading them. From this I found relief : It seemed like a renewal of our long, intimate fraternal intercourse. This suggested the idea of writing his biography, before it was suggested by others. As I anticipated, I have derived great satisfaction from a review of his life

and character ; alloyed, however, by a fear, that, by the infirmities of age, I should not be able to do justice to the subject, if permitted to bring it to a conclusion in any form. But I have great reason to be thankful that a kind Providence has enabled me to bring the work to a close, though not in a manner satisfactory to myself. A considerable portion of the time since the decease of my brother, I have been wholly unable to write, and at all times writing with difficulty. I have permitted a great portion of the work to be copied from the first draught. But if the work, with all its defects, shall prove useful ; if I have portrayed the character of NATHANIEL CHIPMAN with exact truth ; if I have succeeded in accounting for the acuteness, strength and comprehension of his mind, and for that fund of general knowledge which he had acquired, by truly setting forth his early training, his early voluntary attention, his conscientious regard for truth, and his systematic diligence,—I have accomplished all I wished. I have set forth an example, to be followed by parents in training their children, by young men in the course of their education, and by all in public life. To write a panegyric would, in this case, savor of van-

ity, and is in no case very useful, without setting forth the early training and the early acquired habits which contributed to form the character of the person eulogized, as an example to be followed by the rising generation. Such is, undoubtedly, the legitimate purpose of biography. To eulogize a great and a good man may indeed be useful, by exciting an ambition to follow his example, but it does not instruct the young by what means they may be enabled to do so. Biographers are generally compelled, from a want of a knowledge of facts, to content themselves with portraying the character as it appeared on the theatre of life, without setting forth the causes which operated in forming it. Fortunately, in this case, I have been able to obtain the necessary facts, or rather to detail them from my own knowledge. All this I could do without any embarrassment. But from my near connection with Judge Chipman, and from the very high estimation in which I had ever held him as a judge, I felt a delicacy in portraying his judicial character, fearing that I might either go beyond or fall short of exact truth. So sensibly did I feel this embarrassment, that I concluded to engage some jurist, more compe-

tent and more impartial, to write his judicial character. Having formed this conclusion, for obvious reasons, my attention was immediately turned to the Hon. Samuel Prentiss ; and I took leave to write him on the subject. In answer, I received the following letter :

MONTPELIER, Dec. 14th, 1843.

DEAR SIR : I have reflected upon the subject of your letter, and am quite free to say that in my opinion, no one is so competent to write the judicial character of your brother, as yourself. You have advantages in the execution of such an undertaking which no other one possesses. You were a cotemporary with him, practised at the bar under his administration, and know, of course, all the various traits of mind and constitutional temperament, which, combined with his deep and extensive learning, entitled him to rank among the first judges of this, or any other country. From your personal observation and intimate knowledge of him both in public and private, you are enabled to state the prominent features of his mind and character as a judge, and to illustrate his peculiar excellencies in that capacity,

with more truth, discrimination and accuracy, than it is in the power of any one else at this day to do.

I knew his general reputation as a judge, and witnessed, during the short period he was last on the bench, exhibitions of the great strength, vigor, comprehension and clearness of his mind, of his profound and accurate knowledge of legal principles, and of his remarkably discriminating and well-balanced judgment; but my practice in the supreme court was at that time but just commencing, and my opportunities of personal observation were too few and limited to enable me to give, with just precision and distinctness, neither going beyond nor falling short of exact truth, the distinguishing traits of his judicial character. All this, as I have said, you have the means of doing, and I think you should feel no delicacy in performing it, but express your views with perfect freedom, and without reserve. The life of Lord Keeper Guilford, one of the most interesting biographies extant, was written by his brother; the life of Lord Hardwick, if I recollect right, was the production of his son; and so was the life of Lord Teignmouth the work of his son. To these might be added many other instances of the like

kind, both in English and American literature ; so, you see, you are not without the support of numerous and very illustrious examples.

I am, with high respect,

Your obedient, &c.

SAMUEL PRENTISS.

HON. DANIEL CHIPMAN.

On the receipt of the foregoing letter, I proceeded with the work, following the friendly advice of Judge Prentiss in expressing my views, as the reader will perceive, with perfect freedom, and without any reserve ; and, I hope, without going beyond or falling short of exact truth.

Ripton, August 13, 1844.

CONTENTS.

CHAPTER I.

Genealogy of the Family — The staid Habits of the Puritans continued during his Childhood and Youth — Diligent and systematic Pursuit of his collegiate Studies — Appointed Lieutenant in the revolutionary Army — Some of his juvenile poetic Productions — Letters to some of his Classmates, written while in the Army, and when pursuing his legal Studies — Admitted to the Bar in Connecticut and commenced Practice in Vermont — His standing at the Bar.	Page. 5
--	------------

CHAPTER II.

Secret Negotiations with the British Authorities in Canada — Extract from the "Life of Brant," containing a Charge of Criminality against the Leading Men in Vermont — Vindication of those Patriots against the Charge.	37
--	----

CHAPTER III.

Occasion and beneficial Operation of the Quisting Act — Mr. Chipman unsuccessful in his Farming and other Business — Resolution of the Legislature, by which certain Measures proposed for the Relief of the People calculated only to increase and prolong their Sufferings, were postponed and defeated — Elected Assistant Judge of the Supreme Court.	62
---	----

CHAPTER IV.

- Correspondence between Nathaniel Chipman and Alexander Hamilton — Settlement of the Controversy with New York. 70

CHAPTER V.

- Convention called, by which Vermont acceded to the Union — Speech of Nathaniel Chipman in the Convention — Admission of Vermont to the Union. 83

CHAPTER VI.

- Elected Chief Justice — Confirmation Charter under New York — Why they were not taken by the Settlers on the West Side of the Mountain — The Law in relation to those Charters settled by Judge Chipman — Appointed District Judge — Letters to General Schuyler and Governor Robinson — Sketches of the "Principles of Government" — Reports and Essays — Resigned his Office of District Judge — Appointed one of a Committee to revise the Statutes — Elected Chief Justice — His Character as a Politician. 96

CHAPTER VII.

- Elected Senator — His Speech in the Senate on a Resolution concerning a breach of its Privileges — Letter expressing his Views of the French Revolution — His Speech on the Judiciary Act. 113

CHAPTER VIII.

- Represented the town of Tinmouth, in the Legislature, for several years — Elected one of the Council of Censors, who proposed Amendments to the Constitution, and published the "Constitutionalist" in support of the Amendments. 153

CHAPTER IX.

- Elected Chief Justice in October, 1813 — Displaced in 1815 — His Judicial Character. 195

CONTENTS.

xi

CHAPTER X.

Page.

Appointed Professor of Law in Middlebury College — Delivered a course of Lectures — His Work on Government — Adventures of his son Edwin — Sickness and Death — Conclusion.	204
---	-----

A P P E N D I X .

NO. I.

A Dissertation on the Act adopting the Common and Statute Laws of England.	221
--	-----

NO. II. — LECTURE I.

On Law in General.	235
----------------------------	-----

NO. III. — LECTURE II.

Of National Law, and Municipal Law in General.	249
--	-----

NO. IV. — LECTURE III.

On the System of Law and the Proper Method of Study.	267
--	-----

NO. V. — LECTURE IV.

On the Right of Property.	283
-----------------------------------	-----

NO. VI.

Observations on Mr. Calhoun's Expose of his Nullification Doctrines, published in the Richmond Whig.	293
--	-----

NO. VII.

Letter from Governor Chittenden to General Washington, upon the Policy and course of Vermont in the Revolutionary War.	383
--	-----

NO. VIII.

Page.

Letter from Nathaniel Chipman to Alexander Hamilton, occasioned by certain Proceedings of the Democratic Society of the County of Chittenden	393
--	-----

LIFE OF NATHANIEL CHIPMAN.

CHAPTER I.

Genealogy of the Family — The staid Habits of the Puritans continued during his Childhood and Youth — Diligent and systematic Pursuit of his collegiate Studies — Appointed Lieutenant in the revolutionary Army — Some of his juvenile poetic Productions — Letters to some of his Classmates, written while in the Army, and when pursuing his legal Studies — Admitted to the Bar in Connecticut and commenced Practice in Vermont — His standing at the Bar.

THE common ancestor of all those bearing the name of Chipman, in North America, was John Chipman, born in Barnstable, in England, in the year 1614. He emigrated to America in the year 1630, at the age of sixteen, and married a daughter of John Howland, one of the pilgrims, who in 1620 landed from the Mayflower upon the Plymouth rock. He settled on a farm in Barnstable, on which his descendants have ever since resided. He was admitted a freeman by vote of the town in December, 1662. His second son, Samuel Chipman, was born in Barnstable, August 15th, 1661. He married Sarah Cobb, and had ten children, one of which was John Chipman, born in Barnstable in 1691, graduated at Har-

vard College in 1711, ordained minister in Beverly, Massachusetts, in 1715, and died in 1775, aged 84. He had fifteen children ; their descendants are very numerous in Nova Scotia and New Brunswick, among whom is Ward Chipman, one of the commissioners under the treaty of Ghent for settling the North-eastern boundary.

The eldest of the ten children of Samuel Chipman was Thomas, born in Barnstable, November 17th, 1687. He settled in Groton, Connecticut, and had five sons, Thomas, John, Amos, Samuel and Jonathan. In the year 1740, he removed with his five sons to Salisbury, Connecticut. In the year 1741, the town of Salisbury was organized, and he was the first representative. When the county of Litchfield was organized, he was appointed a judge of the county court, but died before the first term. His son Samuel, father of the subject of this memoir, married Hannah Austin, of Suffield, Connecticut. The family records having been lost, the following is all that is known of her family. Her father was a physician ; himself and the father of the late Apollos Austin, of Orwell, Vermont, were cousins. The late Seth Austin, of Tunbridge, Vermont, the late Aaron Austin, of New Hartford, Connecticut, the late Daniel Austin, merchant in New York, and the late Eliphalet Austin, of the state of Ohio, were her nephews. And I learned from the late Benjamin Austin, of Boston, that himself and the Austins in Suffield, were of the same stock. Samuel and Hannah Chipman had six sons, Nathaniel, the subject of this memoir, who was born the 15th of November, 1752, Lemuel,

Darius, Cyrus, Samuel and Daniel. The five eldest brothers died at the following ages, to wit: Nathaniel, 90; Lemuel, 76; Darius, 76; Cyrus, 77, and Samuel, 76. Their father, Samuel Chipman, and his two brothers, Thomas and Jonathan, all died in the ninety-first year of their age.

To delineate the character of Nathaniel Chipman, and clearly to account for the early discipline, acuteness, strength and comprehension of his mind, for which in after life he was so distinguished, it seems necessary to advert to the times in which he spent his childhood and youth.

The staid habits of the puritans were continued with little adulteration to the commencement of the revolutionary war. Everything with them was orderly and systematic. In comparison with the religious character of their descendants, their religion was more intellectual. Great stress was laid on orthodoxy — on a clear understanding and steadfast faith in the great doctrines of the Gospel, and less on the vividness of their religious affections. As their religious affections were less vivid, they were more uniform, more habitual, and thus became actuating motives, and settled religious principles by which they were governed in all the concerns of life. Public worship was punctually attended on the Sabbath, but with them this was scarcely more of a religious exercise than the government of their families, the education of their children, industry in their several callings, honesty in their dealings, submission to the civil and ecclesiastical authorities, and the performance of all their moral duties. True, other sects consider all

these as enjoined by the scriptures, but the puritans had in their exercise a more constant reference to the scriptures for direction. Most treatises on religious subjects were argumentative, requiring an exercise of the intellectual faculties, and were in the hands of the mass of the people. Hence a habit of voluntary attention, so indispensable in the education of youth, was early acquired, with a taste for solid and useful reading on other subjects. It has been said, that "the effects upon the intellect of the well-directed pursuit of religious knowledge are not inferior to those of literary and scientific pursuits, in cultivating those mental habits and powers, which are of the greatest importance in the conduct of life, and that the laborious class of the Scotch, afford a striking illustration of this truth. Their acuteness and penetration of thought, solidity of judgment, and habits of reflection for which they have been justly so much noted, have been brought into exercise by their religious culture." The puritans offered as striking an illustration of this truth.

The family government of the puritans was also peculiarly adapted to the cultivation of the intellectual faculties, as well as to laying a foundation for moral and religious principles. The child was governed as well by fear as by affection. If a child be allured to the acquisition of knowledge, it will have a tendency to form an amiable character. But unless he be governed in part by fear of his parent, and act in obedience to his authority, there will seldom be that hardy vigor of intellect, which is so useful in every department of life ; and if, by a too severe and

austere government, a child was sometimes ruined by creating in him an utter impatience of all restraint, and producing a settled opposition to all sound principles, and all legitimate authority, yet in most cases the strictness of family government had a most salutary effect. It created in the child an habitual submission to the will of his earthly parent — an important if not an indispensable preparation for an habitual obedience to the will of our heavenly Parent. Children, too, were brought up in habits of unremitted and patient industry. And when they were called from labor, to study, to obtain an education, this habit of industry greatly accelerated their progress.

The father of the subject of this memoir carried on the business of a blacksmith, and cultivated a small farm, by which he maintained a numerous family. Some of the sons labored with him in the shop, the others on the farm. He was himself a most industrious man, and was very particular in having his sons in constant employment, and all the concerns of the family were subjected to an orderly system, no departure from which was ever permitted.

At an early hour the whole family retired to rest, and all, from the oldest to the youngest, were compelled to rise at an early hour, by means of which they acquired a confirmed habit of early rising, for which they were noted through life. The father and mother were equally industrious, and yet both had a taste for reading, and both read more than most laboring people. Still, it seemed never to interfere with their business. During the winter evenings,

some one in the family read, and what was read was made the subject of conversation. And it is worthy of notice that a well-selected town library had been procured, and that from this library the family were supplied with books.

The subject of this memoir labored on the farm until the year 1772, when he entered upon his preparatory studies for entering college, as was customary in those days, with the minister of the parish. And as he entered upon his studies with a sound body and with a sound mind, both alike invigorated by exercise, and with a settled habit of industry, he made rapid progress in his studies, and entered Yale College in the year 1773, at the age of 21, having spent but nine months in his preparatory studies. For a short time after he entered college he spent most of his time upon his recitations; but he was soon able to make such progress in his classical studies, that he was obliged to spend but a short time in reviewing his lessons before recitation. This enabled him to go forward of his recitations still more rapidly. He followed this course until he left college. He pursued his studies systematically, devoting a certain allotted portion of his time to the languages, another portion of his time to his other classical studies, another to general reading; every day devoting some time to light reading for relaxation. This course he strongly recommended to those who were about to enter college, saying, "if you calculate to become a scholar of any distinction, solely by studying your lessons, so as to appear well at your recitations, you will be sadly disappointed. Or if you pursue your

studies without system, reading this or that, as you may be prompted by the feelings of the moment, you will only dissipate the mind. You will never either discipline the mind, or lay up in order any store of useful knowledge. If you calculate only from day to day to get your recitations, you will sit down to them as a task, and will not acquire a taste for your studies, or take any pleasure in pursuing them; and if you do not, it will be better to quit your studies, no matter how soon. Whereas if you pursue your studies systematically and with diligence, not confining yourself to your recitations, but keeping in advance of them, in all your classical studies, and spending but a short time in reviewing them, you will be far more likely to acquire a taste for your studies and pursue them, not as a dreaded task, but as a most pleasant employment."

He immediately took a high standing in his class, which he maintained through his collegiate course. Although he had a peculiar taste for the languages, yet he had the reputation of a universal scholar. He was advised to prepare and present himself as a candidate for the premium provided to be awarded to the best linguist in the class; but he declined it, on the ground, that his inclination led him to spend as much time in the study of the languages as he ought to do, without this stimulus. This was true; for during his collegiate course he made himself perfect master of the Hebrew, Greek, and Latin. And after he left college and entered upon his profession, he continued through life to read the Old Testament in Hebrew, and the New Testament in Greek, with

Homer, Virgil, and the minor Greek and Latin poets, calculating to go through the course once in a year.

It appears, on examination of his papers, that during his collegiate life, and for a short period after, he exhibited a taste for poetry, but soon after he entered on his profession he desisted from writing poetry altogether. It is evident, therefore, that if he ever entertained an idea of appearing before the world as a poet, he very early abandoned it. I should not therefore, feel justified in publishing any of his juvenile productions, were I not persuaded that the man will, by their publication be more intimately known to the reader. It will I think appear highly probable that if he had not derived a higher degree of pleasure from the exercise of his reasoning faculties, he would have been attracted by the pleasures of the imagination to the cultivation of his poetic talents.

The following was written in May, 1775, soon after the Lexington battle, and is all that remains of the manuscript, the forepart of which has been torn off, and cannot be found. The piece was published in the New Haven Postboy, and as it related to British oppression and the doubtful contest for liberty then just commenced, it attracted considerable notice at the time.

Here, when a tyrant Britain's sceptre swayed,
And persecuting zeal the land o'erspread,
Led by the hand of Heaven across the flood,
The sons of Liberty fixed their abode.
Here desert wilds and trackless wastes they found,
Here savages by thousands girt them round,
With painted arms they poured their legions forth,
In swarthy myriads from the pop'lous north.

To extirpate those mighty sons of fame,
And from the earth to raze their envied name.
In vain they swarmed — aimed their fleet shafts in vain,
O'ercome they fell upon the ensanguined plain.
Now the untrod desert, cultivated, smiled ;
And towns were settled through the pathless wild ;
Young states were founded here and lived at ease,
Enjoyed their freedom and their rights in peace ;
Till France invaded — then the British arms
Her boasted empire shook with dread alarms.
With laurels were the British armies crowned,
And Canada the British sceptre owned.
Now tyranny again has filled the throne,
And from the British senate virtue flown.
False to their oaths, and to their solemn trust,
They tread the rights of nations in the dust.
America, where freedom held her reign,
Now first is doomed to wear the galling chain.
Oppressed, she groans beneath their lawless power,
And quakes to hear the gathering tempest roar.
Rise ! sons of freedom ! close the glorious fight,
Stand for religion, for your country's right.
Resist the tyrant, disappoint his hopes,
Fear not his navies, or his veteran troops.
Think on those heroes who resigned their breath
To tools of tyrants, ministers of death,
Who firm, the rage of tyranny withstood,
And seal'd the cause of liberty with blood.
Let their example patriot zeal inspire,
And every breast with martial ardor fire.
Oh Heaven ! be gracious ; save our sinking land,
Crush our proud foes with thine avenging hand.
Kindle thy thunders, bid thy lightnings fly,
Let tempests heave the ocean to the sky.
Plunge in the billowy deeps their naval power,
Or cast them shipwreck'd on some unknown shore.
Let white-robed peace once more extend her reign,
And justice hold the impartial sword again.

Under their influence let an empire rise,
And far extend beneath the western skies.
From sea to sea — from Darien to pole,
Till time shall end, till years shall cease to roll.

The following was written to Mr. Cogswell, a classmate, in April, 1777, after he had received a lieutenant's commission in the army.

No more, my friend, I'll rack my brains,
To write in high heroic strains,
But since I see 't is what you choose,
I'll court the Hudibrastic muse.
And think you then the softer passion
Of love, with me is out of fashion?
Or think my heart so hard has grown,
No charm can ever melt it down.
You'd make your friend a very stoic
For only jesting in heroic.
However, sir, since you've begun,
I'll tell a tale to help it on.
When every beast could talk and chatter,
As learned *Æsop* tells the matter,
On high there hung a bunch of grapes,
For which a fox took many leaps;
But when he found he could not gain them,
He thus affected to disdain them:
Hang them, he says, I'll leap no more,
For when they're gained they're cruel sour.
Think you this fox would never leap,
To catch another tempting grape?
Or can you safely make the assertion,
That all thenceforth were his aversion?
Or should I now give o'er the tilt,
If one or two have play'd the jilt?
Because a lass has proved unkind,
Can that forever sour my mind?

You'll think it strange what I assert,
But I will venture to aver 't
I ne'er found Heaven in smiles alone,
Nor yet damnation in a frown.
'T is my opinion, sensibility
Should never banish all tranquillity.
Avast ! methinks you say, enough
Of this condemned insipid stuff.
Let's know how you employ your time.
Why faith, you see I'm writing rhyme :
But I no more Parnassus tread,
A foolish whim has turned my head.
The muse has lost her wonted charms,
And I am rushing on to arms.
No more I sing of bloody fight,
But now prepare myself to try 't.
And leave to you the extensive rule
You've late acquir'd in country school ;
Your whip, your ferrule and your pen,
And cringing band of pigmy men.
Yes, you may laugh to see me cased
In armor, with a cockade graced ;
Nor will you laugh alone, I warrant,
At such a doughty huge knight-errant.

The following were written in camp at Valley-forge, in February, 1778, to Mr. Fitch, a classmate, afterwards president of Williams College.

From where the Schuylkill rolls its waves,
And Pennsylvania's meadows laves,
To Fitch, mine and the muses friend,
These Hudibrastic lines I send.
While you drink deep the Aonian fountain,
Or range Parnassus' sacred mountain,
Beneath those blooming shades recline,
Surrounded by the immortal Nine !

Now tune your harp to pastoral strains,
To love, to joys, and tender pains ;
And while the plaintive numbers flow,
With raptures feel your bosom glow,
Or now unlock the learned store,
By sages treasured up of yore,
Weep o'er the fallen hero's hearse,
Trace mighty empires from their source,
See how they rose by freedom's force,
See how disinterest made them great,
Or fell corruption sapped the state ;
With god-like Plato moralize,
Or soar with Homer to the skies ;
Or now more modern works you read
As judgment, or as fancy lead.
And when the over-studied mind
To recreation is inclined,
In circle with the softer sex
Gayly in conversation mix.
Now woo the mistress of your heart,
Who feels herself the pleasing smart,
And glows alike with chaste desires,
Unmix'd with mere licentious fires,
A passion to the mob unknown
And felt by generous souls alone.
While you these rapturous scenes pursue,
Where pleasure rises ever new ;
By cruel fate condemned to roam
Far from my friends and native home,
Where ruthless war in triumph reigns,
And desolation sweeps the plains.
Here must we feel the inclement air,
Bear all the unequalled toils of war ;
Meet hardship in a thousand forms,
Now scorch'd with heat, now drench'd with storms.
With cold and want maintain the strife,
Such are the ills of martial life.

Anon the cannons' war alarms,
And leaders cry aloud, to arms !
Now polished arms in dread array
Beaming, restore the blaze of day, —
The streaming standards blaze on high,
And front to front the hosts draw nigh ;
And now they close with direful shock,
The fields involved in flames and smoke,
Disploded with tremendous roar
That echoes to the distant shore,
While leaden deaths thick fly around,
And slaughtered heroes strew the ground.
Terror in every form appears,
Now shouts, now groans assail the ears.
The earth is drenched in streaming blood
That purples every neighboring flood ;
Till one deep pierced in disarray,
Is forced to yield the fatal day.
And now, my friend, come view the plain,
Deformed with mangled heaps of slain ;
See here by deadly wounds subdued,
Thousands still weltering in their blood.
Their country's glory was their all,
For her they fought, for her they fall.
Oh grant, kind Heaven, these scenes may end,
And peace her olive-branch extend ;
In freedom this fair land be blest,
Nor Britain more our right contest.

Among the papers of the deceased I find translations of several odes of Horace, and of part of his satires — made during his collegiate life. The following is a short poem from Anacreon, paraphrased.

Unhappy he whose callous heart
Ne'er felt the joys of love,
Whose bosom, steeled to soft desires,
Not Venus' self can move.

Unhappy he who yields his heart
A pray to Love's enchanting snare,
Whose hopes of bliss alone depend
On some inconstant fair.

But more unhappy he who loves,
Yet meets no kind return,
Whose sighs, whose tears, and tender vows
Are all repaid with scorn.

Soon after the close of the revolutionary war, the people, from habits of idleness and dissipation, contracted during its seven years continuance, found themselves impoverished, and wholly unable to pay their debts. And as it ever is with individuals so it is with communities; if they find themselves in a poor, distressed condition, they never once think of ascribing it to the true cause, their own misconduct, but invariably charge it to misfortune, or what is more natural and more common, to the wrong-doing of others. The distress of the people was not at that time laid to the oppressive aristocracy of wealthy individuals, they were too few in number to attract attention. But as the people felt the pressure of their debts through the courts, the lawyers, and the sheriffs, the cry was, "stop the courts," expel the lawyers, and resist the sheriffs; and the people began to hold conventions to increase the excitement and to organize an opposition to the government. For this purpose a convention was holden at Wells, or rather in the "edge of Wells," for at that day, (how it is now I know not) all the inhabitants of Wells invariably gave as the place of their residence "The edge of Wells."

The convention published a journal of their pro-

ceedings, and the subject of this memoir, wrote and published the following as a burlesque on these proceedings. It was considered at the time, that it had a very salutary effect. Many individuals who had before favored the malecontents, were afterwards unwilling to be seen with them.

JOURNAL OF THE WELLS CONVENTION, 1786.

- Whereas the assembly of this state
Have dared audaciously of late
• With purpose vile the constitution
To break, or make a wicked use on;
By making laws and raising taxes,
And viler still, (so truth of fact is)
By keeping up that smooth-tongued clan,
For ages cursed by God and man,
Attorneys, whose eternal gabble,
Confounds the inexperienced rabble;
Who quote down precedents and cases,
Of ancient date, in ancient phrases;
Hard lessons taught by deep-read sages
Whom mankind have revered for ages,
Of law the guardian and trustees,
And oracles in courts of justice;
Forbid the courts to arbitrate,
And deal the jury proof by weight;
Would have all actions tried by rules,
A tenet fit for slaves and fools;
And what is worst in land of freedom,
The judge and jury often heed 'em,
And Tom and John must lose their cause,
And why? Forsooth, they've broke the laws.
'T is liberty we have in view,
'T is liberty we all pursue.
To think, to speak, to act and do,
And none to say why do ye so?

Sorely aggrieved at such sad doing,
Which tends to work our utter ruin,
In edge of Wells, in log house met,
To rectify affairs of state,
We first appoint a moderator,
To stop or license every prater ;
And then to keep our votes in order,
With caution great appoint recorder,
John, who alone in time of need,
Of all convened could write or read,
Then after many a sage debate,
And argument of mighty weight.
Now heard from some what others said
Who 'd heard the constitution read.
Though some to this put in demurrer,
Averred we all were in an error,
And swore they knew the constitution
Was but an heathenish delusion,
An image formed with many a head,
Like what they 'd heard in Bible read,
To which the assemblymen all swore
To love it, cherish and adore.
But all to this would not give credit,
Although they roundly swore and said it ;
As one agreed that we 'll petition
The assembly hence at every session,
So long as we shall think it best,
To get our grievances redrest ;
Inform them that their laws of course
Before they gain a binding force,
Must all be sent to this convention,
Or others, formed with like intention,
For their consent and approbation —
Such right we have in legislation.
For those whom we have thought most fitting
To vote for at each freeman's meeting,
Through lack of votes we never chose,
Or could not go through lack of clothes —

The laws by us were never made,
What reason then they be obeyed?
And don't these things in fact abridge us
Of all our rights and privileges?
Beside, let fees be lessened down,
And judges sit for half a crown.
A half a crown has been the wages
Of common lab'ring men for ages;
And how can these who sit at ease
With nought to do, earn greater fees?
But lest the world should think us partial,
And this is but a mobbish farce all,
Let them of us the judges make —
We're ready or to give or take.
Nor do we lack men of discerning,
Of parts robust — a fig for learning,
Nor do we lack for judgeline gear,
We've rusty wigs bobb'd to the ear,
And leathern doublets neatly made,
And aprons matched, in sign of trade;
Striped linsey-woolsey vest and hose,
Which comely leather buttons close,
Huge bludgeons made of trusty oak,
Will settle wranglers every stroke,
And fit the hand of justice well
As sword of truest tempered steel.
Then lawyers from the courts expel,
Cancel our debts, and all is well.
But should they finally neglect
To take the measures we direct,
Still fond of their own power and wisdom,
We'll find effectual means to twist them.
And now to prove we mean no evil,
To all the world we will be civil.
Firmly resolved to murder no man,
Plunder, nor rob, nor ravish woman.
Not but if hunger press us hard,
We'll take a hen from neighbor's yard,

Or now and then a lusty sheep,
Or leg of pork while the owners sleep,
To this we have prescriptive right,
If done with caution, while 't is night.
Nor can we less, ere we conclude,
Than give as due in gratitude,
Our thanks to Amos what's his name?
Whose piece eclipses Bunyan's fame,
Well vindicates what we've agreed to,
And stops attorneys just as we do,
Proves but for them we might refuse
To pay our long-forgotten dues,
To creditors might bid defiance,
And look at sheriffs, bold as lions.

The following, on the death of a child, occasioned by a scald, was written in the year 1788. And it is very certain that he never wrote a line of poetry afterwards.

Why, dear Amanda, why that mournful look,
Why ceaseless flows the tear, why heaves the breast?
Because thy babe, sweet innocent, is gone
To dwell embosomed in eternal rest.

Hard, hard the lot to see the lovely form
Just blooming into life, with cruel smart
And pangs convulsive yield a prey to death.
How agonizing to a parent's heart!

Flow then the tear and heave the aching breast
Paternal tenderness and nature bid;
Yet not too long indulge the pleasing woe,
Nor wrong the living while you mourn the dead.

Ah! can a mother soon to oblivion yield
Those little actions, pledge of future joy,
The endearing smile, the more than fond embrace,
And in distress the mute imploring eye.

Descend, sweet cherub, from the blest abode,
Oft deign to visit those thou 'st left behind,
In slumbers gently soothe a parent's cares,
And whisper comfort to the anxious mind.

To souls enlarged, though in a realm of bliss,
Such office sure must yield a sweet employ;
To soothe parental grief, to calm distress,
Must give a zest e'en to celestial joy.

The reader will notice that the subject of this memoir left college in the spring of the year 1777; and in bringing together such of his poetical productions as it seemed proper to publish, I have gone forward to the year 1788. We will now revert to the spring of the year 1777, which was his senior year, when he obtained a lieutenant's commission, and immediately joined the army. At the ensuing commencement his degree was conferred in his absence. While in the army he maintained a high standing for an officer of his rank, but I have been able to learn nothing very particular in relation to him while there, except what appears from the foregoing poetic epistle to Mr. Fitch, and from the following letters written by him to some of his classmates, of which he preserved copies.

The following letter to Elisha Lee is dated Valley-Forge, April 10, 1778.

DEAR SIR, — I have received letters from many of my old friends, but from you, Fitch and Coggsell, whom I esteemed my most intimate friends, not a line. Letter after letter have I sent to no purpose — they may have indeed miscarried, though the opportunities were very direct. I am informed by letter

from A——, that you are still teaching a school at Middletown.

How are the times in Connecticut? What the run of politics? What plan of operations have your chimney-corner generals struck out for the next campaign? They have doubtless something in agitation. I saw an item of this in a letter from a gentleman of your acquaintance; I will give it you in his own words, as near as I can recollect them. "It is a disgrace to humanity, to Britons and Americans, that two such powerful armies, on whom the fate of Europe and America depends, should lie inactive. What can Howe, what can Washington mean? What stupidity! It is not enough that we carried the campaign through almost half the winter? No, we must still keep the field in defiance of frost and snow, or what at that season is still worse, rain and hail, though one half the army was disbanded and the other half worn out with fatigue. Nothing less will suffice than the siege of Philadelphia in the depth of winter. How mean, how despicable must such persons appear to men of the least reflection. Persons who never saw an army, or read of a battle, except in a newspaper, who, for intelligence, depend on common report at three hundred miles distance, and yet would persuade the world that they could direct the movements of an army better than an experienced general on the spot, who is minutely informed of every circumstance relative to both armies. That men, who pretend to be rational, should speak in this manner, is indeed 'a disgrace to humanity.'"

There is another thing that raises my indignation

still higher. I learn that it is a common topic of conversation in Connecticut, and, indeed, through New England, that General Washington will not fight. "Let Gates," say they, "take the command, and we shall see an end of the war." General Gates has done well, he has done gloriously ; I have as high a sense of his merit as any man. But the truth is, Burgoyne failed himself, and Gates conquered him. Besides, Gates was in a situation to command what assistance he pleased, and that the flower of the continent. What shall we say of Washington here at the head of fifteen, or at most, twenty thousand men, for his army never exceeded that number, and one third of them Pennsylvania militia, who for the most part never dared to face an enemy. I have seen, when our regiment was closely engaged, and almost surrounded, seven hundred of them quit the field without firing a gun. On the seventh of December, the army of the enemy, exclusive of those left to garrison Philadelphia, and the neighboring posts, amounted to eleven thousand effective men. From this, you may judge of their strength at the opening of the campaign. There is not another state on the continent where so many traitors are to be found, as in this, and yet General Washington baffled all the stratagems of a wary, politic and experienced general, and has several times fought him not unsuccessfully. All General Gates has done does not render it even probable, that in General Washington's situation, he would not have been totally defeated. The army, to a man, except those who conquered under Gates, have the highest opinion of General Washington.

They love, I had almost said, they adore him. While *he* lives, be assured, they will never brook the command of another. I cannot but observe here, that nothing has been more detrimental to us, than publicly exaggerating our strength, and diminishing that of the enemy; you will readily perceive the consequences. When the campaign will open I know not. The troops spend their time in discipline, in which they make great proficiency. We have for our inspector-general, Baron Steuben, who has been aide-de-camp to the king of Prussia, and lieutenant-general in his service.

The following letter to Mr. Lee was dated, Camp, at Valley-Forge in April, 1778 :

DEAR SIR, — I had just sealed my letter No. 3, when yours of the 25th instant came to hand. I have prevailed on the post to wait for this. I have in a former letter given you a particular account of my adventures since I saw you; but I suppose the letter miscarried. I have not now time to enter into details. As to the situation of the armies, Howe is in Philadelphia, and we are encamped and strongly fortified twenty miles above, on the banks of the Schuylkill. I can give you no account of their intentions, since, whatever may be the reason, I have not of late been admitted to the cabinet. The officers of the army are at present in a great dilemma, whether in contempt of poverty and the unmerited reproaches of their ungrateful constituents, they shall still continue in the service of their country, or quit, and join with the rest of the world in the pursuit of riches. Depend upon it, if something is not done, most of them will

resign, and that soon. I have no expectation of seeing you in the country till the close of another campaign. I have a letter from Swift. Please make him my compliments, and tell him I shall not fail of answering him by the first opportunity.

The following letter to Mr. Fitch was dated White Plains, July 30th, 1778.

MY OLD FRIEND, — I received yours of the 3d of June on the 29th of the same month, at Monmouth, the day after the action. I shall omit any account of that affair. You must have seen more particular accounts of it than I am able to give. Since we arrived at the Plains I had the pleasure of meeting Coggs-well and Barker again; spent an evening with them and Selden at Stanford, on their march to the eastward.

You tell me that you have neglected the Muses of late; I will venture to assign the ladies as the cause, and, indeed, I cannot blame you for paying them so much attention; I should doubtless do the same. But, my dear friend, by this neglect of the Muses you not only injure yourself, but many heroes, who expected, as the only reward of their services, to have their names hitched into rhyme by some poet.

As rising gales
That swell the spreading sails
To waft the merchant o'er the main,
As clouds, in vernal showers distill'd,
Enrich the new-sown field,
And joy the laboring swain,
Such is the muse to those who run
In virtue's arduous ways,
She bids them here enjoy renown
And sings to future times their praise.

You will give full credit when I tell you that I have just translated the above from Pindar. And to direct you in your duty, I shall give you another lesson from the same.

Not Envy's self shall blast the praise
Of those who gain the martial prize ;
The muse on towering wing shall rise
And sing them in immortal lays.
But wisdom is the sacred gift of Heaven
To use aright whate'er the gods have given.

I fancy Pindar would shine in my translation. A great pity it is that I have not leisure to give him to the world in a new dress. But this and many other plans of like importance are laid aside for want of time. I have only time to add I am truly yours.

To Mr. Fitch, dated Camp, at Fredericksburg, October 3, 1778.

DEAR FRIEND, — I lately saw a letter to our friend B——, in which you make very kind mention of my name, but was not a little surprised that you have so long neglected to write me. I immediately examined the letters which have passed between us, and found you were one in my debt ; and depend on it, I shall demand payment without conscience.

Before this reaches you, I shall, in all probability, have resigned. My wages, which are my sole dependence, are by no means equal to my expenses. I am already in debt, and a continuance in the service, to me affords no other prospect than that of utter ruin. If I resign, unqualified as I am for business, and without friends, at least powerful friends, I shall find myself extremely embarrassed — and often apply

to myself certain lines of Thomson with a little alteration :

A quick returning pang
Shoots through the conscious heart where honor still,
And great designs against the oppressive load
Of poverty, by fits impatient heave.

Although it is a great mortification to me to resign, it is a greater to hold the rank, and not be able to support the character of a gentleman. I forbear any reflections on the country, yet I cannot but pity the condition of the officers, many of whom I know to be in a worse condition than myself, as they are more reduced, and have more to provide for. It is very shocking to think that many brave fellows who have been accustomed to command others, and to be treated with respect, who have a thousand times exposed their lives, have spent their estates and ruined their constitutions in defence of their country, must soon with their families be reduced to want. And perhaps derided and insulted by those whom they have defended. Forbid it, humanity ! forbid it Heaven. You will, as a friend, pardon these apprehensions, gloomy indeed, but, as I think, founded in reason.

I shall spend the winter in Salisbury, Connecticut, in the study of law ; though I cannot but regret that it is not in my power to spend considerable time in general studies, before applying myself to a particular one. Opportunities of writing will doubtless be less frequent after I leave the service, but I shall embrace every one that occurs, and shall from your friendship expect the same. And I will also promise to write a better hand, or procure some one to copy.

Winter quarters are now in agitation. Litchfield is talked of for this division. Where they will be, is uncertain as yet. I think, from all appearances, we may reasonably conclude that the glorious contest draws near a glorious conclusion, when, with the blessing of heaven, we may enjoy the sweets of liberty in peace.

To Mr. Fitch, dated Salisbury, 1st January, 1779.

MY DEAR FRIEND, — What mean you by silk bags? Are you so unacquainted with modern fashions? Such bags have long been out of fashion with lawyers. In their stead are introduced bags made of harpies' skins. They are covered with a very soft down, the color changeable like a chameleon, but not like them stuffed with air. Their properties are emblematical not only of the present disposition of the fraternity, but of the whole human race. Although inanimate, they have a most voracious appetite. Had Solomon lived in these times, he would have found one thing more which never cries enough. The color, varying with the beholder's fancy, has such a peculiar magic, that whoever has once fixed his eyes upon them can never rest, until he has given up his whole interest to be devoured.

I have not yet taken the wrangler's, I would say, the attorney's oath, but expect to take it in March, and then I shall probably settle in Bennington, where I shall indeed be *rara avis in terris*, for there is not an attorney in the state. Think, Fitch, think what a figure I shall make, when I become the oracle of law to the state of Vermont.

To Mr. Fitch, dated Salisbury, March 20th, 1779.

Well, my dear friend, I have at length passed the Rubicon, and am in full march to the capital of the empire. In plain language, I have been dubbed an attorney, and propose, in a few days, to take up my abode in the state of Vermont. It would be the height of my wishes to spend the summer at our alma mater, with you and others of my classical friends. But I am obliged to bid adieu to all these charming prospects, and plunge into business. I must hope, however, by favor of the Muses, to participate in your happiness. But how, my friend, how happens it that you decline the desk? You, a person, as we thought, destined, by nature and inclination, to be an honor to that sacred employment. Are you deterred by a few of our classmates who are engaged in it, and who are a disgrace to the order, or rather to themselves in the order? Though I wholly disclaim the thought of being a deist, as some have represented me, I own that I am somewhat liberal in my religious sentiments, but not too liberal to believe that none can do more to promote the happiness of man, whether in public or private life, than a learned and pious clergy. After all, I say not this to deter you from the study of the law. I should be very happy to have you as a brother as well as a friend in that profession. One thing, however, we must both forget, that is our diffidence; it has no place at the bar. Ha, ha, ha. I cannot but laugh to think what a flash we shall make, when we come to be members of congress. And then again, I am vexed when I think how many steps there are by which we must mount to that pinnacle

of happiness. Let's see. First, an attorney; then, a selectman; a huffing justice; a deputy; an assistant;¹ a member of congress. Now, is not this a little vexing? However, we must make the best of it. Since we shall in future be at so great a distance from each other, I feel anxious for a continuance of our correspondence. Should Tracy remain through the summer at Litchfield, it may be carried on through him, or perhaps some other way more direct may be found. But the difficulty is, I shall not know to what place to direct my letters. Nor will you, for I am not fully determined in what place I shall settle. In the direction of your letters, in future, you will omit lieutenant. I shall not be known by that title in Vermont.

The following is a copy of the letter in which Lieutenant Chipman resigned his commission. It is dated Camp Fredericksburg, October 10, 1778, and addressed to General Washington, the commander-in-chief.

MAY IT PLEASE YOUR EXCELLENCY, — With reluctance would I quit the service of my country, could I subsist myself in it with honor. Every one must be sensible that a subaltern's wages are in no degree equal to his expenses; he must necessarily have some other resources, or make a contemptible appearance; he must, in fact, become a beggar. If I may be allowed to judge my own heart, I am ready, in behalf of my country, to sacrifice every consideration of interest as far as may be consistent with honor.

¹ A representative in the assembly, a member of the court in Connecticut.

When I engaged in the service, I had no fortune of my own. My parents, on whom alone was my whole dependence, were, the last year, driven from their habitation, plundered, and, for the present, reduced to poverty; so that my wages have been my only support. These, at first, afforded an honorable subsistence; but, so far is this from being the case at present, that I find it impossible to continue in the service without involving myself deeper in debt, without the least prospect of being able to pay the debts which I have already contracted, unless I can obtain a dismissal. I feel a great reluctance to that dependence which is the necessary consequence of being in debt; for, as I am unable to answer the demands of my creditors, it will be in their power to ruin me when they please.

It is, indeed, a great mortification to be obliged to resign, but a greater to hold the rank, while unable to support the character, of an officer. Under these circumstances, which are my own without exaggeration, I am persuaded that it is a duty which I owe to myself and others, if possible, to procure a discharge from the service. This is my request, which I hope, on a thorough examination, will not be thought unreasonable.

It seemed necessary to resort to the foregoing letters, they being the only source of information relative to that part of his life which was spent in the army. It was indeed understood at the time, that he kept with him in the camp his Greek and Latin classics. And that instead of losing his knowledge

of the languages, after he left college, as is too often the case with college graduates, he made great proficiency in perfecting his knowledge of them. That he paid this attention to the languages while in the army is rendered very certain by the known fact that he paid the same attention to them in after life. He was frequently involved in business of a laborious and perplexing nature, and yet he would find time to devote to the acquisition of knowledge. And he always gained time by wasting less time in sleep than most others. Until the latter part of his life, from five to six hours sleep in twenty-four was all that his constitution required. While in college, and in his after life, he was in the habit of reading several hours by candlelight in the morning, before others were up, except during the short nights in summer. Fortunately, until near the close of his life, his eyes would bear this hard usage without injury. He undoubtedly pursued this course while in the army, and must have found much time for reading and writing, especially while in winter quarters. And yet, notwithstanding his confirmed habit of improving every spare moment in his literary pursuits, I was not quite prepared for the fact, that so soon after the dust and smoke of the battle of Monmouth had passed off, he was discovered intently engaged in translating Pindar.

He was very fond of works of fiction, and read all the novels that came in his way, and read them with uncommon rapidity. But he resorted to novels and other light reading, for relaxation, when the mind was fatigued by intense application too long con-

tinued. He seemed to have no taste for those diversions to which most others resort for relaxation. He never, either while in college or in after life, spent much time in the study of mathematics. Whenever he had occasion to solve a mathematical question, he would do it with great ease and rapidity, but he never attended to mathematical studies, for the purpose of disciplining his mind. He seemed to be conscious that his mind required no such discipline.

It has been seen that he was admitted to the bar, in the county of Litchfield, and state of Connecticut, in March, 1779; after having studied law between four and five months. He soon after set out for Vermont, and arrived at his father's house in Tinmouth on the 10th of April. He settled in Tinmouth, that being then the shire town in Rutland county, and commenced practice in the then four counties of Bennington and Rutland, Windham and Windsor, and was immediately a prominent member of the bar. He was most distinguished in the argument of questions of law to the court, but frequently argued causes to the jury with great effect. When it was his business to detect and expose fraud or oppression, he excelled as an advocate. But it was soon observed that he did not argue a bad cause as effectually as some others. And after I came to the bar I thought I could discover, especially if I could catch his eye, whether he had confidence in his case or not. The fact seemed to be, that he had acquired so confirmed a habit of seeking after truth conscientiously, that he could not readily enter into the

feelings of his client, imbibe his prejudices, and with him have a full conviction of the justice of his cause, without which no advocate can make the most of a bad cause. I shall enlarge on this subject when I come to treat of his qualifications as a judge.

CHAPTER II.

Secret Negotiations with the British Authorities in Canada — Extract from the "Life of Brant," containing a Charge of Criminality against the Leading Men in Vermont — Vindication of those Patriots against the Charge.

It has become a matter of history, and is generally known, that at the session of the legislature holden at Charlestown, in October, 1781, Governor Chittenden received a despatch from General St. Ledger, making an excuse for the killing of Tupper, an American sergeant, by a British scout; and which necessarily disclosed the secret armistice, which had sometime before been agreed on, between the executive of this state and the governor of Canada. The contents of the despatch had in some way become known to certain individuals who were not in the secret. This at once produced a high degree of excitement, and raised a clamor which it was necessary to silence without delay. And no other mode of doing this occurred at the time but that of remoulding the despatch, leaving out everything which related to the armistice, so that it might be communicated to the legislature. At this time there were two parties in the state. At the head of one party was Governor Chittenden, Ira Allen and others, called the old corps. Nathaniel Chipman was ranked with the opposition,

yet Governor Chittenden had such confidence in his talents and patriotism, that he committed the despatch to him for revision; which task he speedily performed, and in a satisfactory manner. For when the revised despatch was read in the assembly, they were satisfied that their suspicions had been without foundation; the excitement was allayed, and the legislature proceeded with the ordinary business of the session. It will be proper, in this place, to make some remarks upon this secret negotiation with the governor of Canada, for the subject of this memoir was connected with it.

Certain historians, unacquainted with the early history of this state, have not scrupled to charge Governor Chittenden and his compatriots with treason against the United States, for entering into a secret negotiation with their enemies, with the intention of joining the British in the war of the revolution — a charge without the least foundation in fact. And should the present generation suffer this stain to rest on the characters of our fathers, so distinguished among that band of patriots who achieved our independence, it would indicate a degeneracy which they have not yet reached. Facts, which have ever been known to the people of this state, will convince every unprejudiced mind that, not only were Governor Chittenden and the executive council of this state actuated by the purest patriotism, but that their sagacity and wisdom were remarkably conspicuous through the whole of the negotiation, from the commencement to its close; a period of several years; and that it proved, as they intended and foresaw it

would prove, as beneficial to the United States as to the people of this state.

At the commencement of the revolutionary war, the people on the New Hampshire grants were more united in defence of the country, than the people in any one of the then United States. A less proportion of tories were found among them than were found in the other states. The causes of this are obvious to those who were intimately acquainted with our early history. Great numbers of the early settlers on the New Hampshire Grants, were of the sect of new-lights or separates, who fled from persecution in the New England States, and found an asylum here, where they enjoyed their religious liberty. And history informs us that every people on earth who have by persecution been forced to contend for their religious liberty, have ever been prepared to contend with equal perseverance for their civil rights. Accordingly, in the contest with Great Britain for our civil and political rights, this sect of Christians in the New Hampshire grants were firmly united in the cause of their country. It is believed there was not a single exception.

Add to this, that the people of this territory had for a number of years been united and organized in opposition to the unjust claim of New York, and had thus far been successful. When therefore their rights were invaded from another quarter, they were perfectly prepared for resistance. They had no habit of quiet submission to the powers that be, to be broken up, but were already harnessed for the conflict. Still further, the government of Great Britain had decided

that this territory was within the jurisdiction of New York. Nothing therefore was to be expected from that government but a confirmation of the New York title, should the United States fail of establishing their independence. On the other hand they had reason to hope, that if the United States should achieve their independence, the claim of New York would be set aside, and Vermont would become an independent state. Such a people, thus situated, could not but be united as they were in the cause of their country, and support it as they did to the last, with unabated ardor. Could such a people have been influenced to join their enemies? a step forbidden alike by patriotism and by self-interest.

Again, after the battle of Bennington, and the capture of Burgoyne, scarce a doubt was entertained that the United States would achieve their independence. In what situation, then, was Vermont to be placed by this secret negotiation? Was she to become a British province, or was she to be an independent state under the protection of Great Britain? In other words, in case of a war between the United States and Great Britain, was this to be made the common fighting ground, and the inhabitants exposed to be plundered by both armies?

I had proceeded thus far, calculating to conclude the subject with some brief remarks — believing that, from what has been said, it would be admitted by all, that there is not the least foundation for the charge of criminality against the leading men in Vermont, in their secret negotiation with the British. But on reviewing the subject, I am satisfied that duty requires

a further examination of it. Can we be satisfied? Can we be excused, if we suffer the character of our patriot fathers, who achieved the independence of the state, and who acted so distinguished a part in achieving our national independence, to go down to posterity, stained with the most unfounded charges of treason against their country, without showing, as it is in our power to do, that the overt acts of treason specified, were dictated by the purest patriotism, and as intended, afforded essential aid in the war of independence? This must not be, but their acts and intentions must be truly stated, that posterity may have a full knowledge of their character. I feel this duty to be more imperative, because this charge, made in the most formal manner, with a detail of the evidence in support of it, is contained in that interesting work, "The Life of Joseph Brant," a work which will be read with interest by future generations. The author has collected and detailed all the evidence on which he founds his charge, and on which he pronounces sentence. Now to me this evidence appears not only insufficient to prove the charge, but wholly irrelevant. Yet I have good reason to distrust my own judgment in relation to the weight of this evidence, as I have a personal knowledge of the facts in the case. For although I was too young at the time of this secret negotiation to be an actor in public affairs, yet I lived with my brother, who was a principal actor in all public transactions at that day, and, as we have seen, was concerned in this negotiation; and from him I had at the time a knowledge of it, from near the commencement to the close. But

never did I hear from him, or any one of the leading men, an intimation that they thought of complying with the propositions of the British. But, on the contrary, whenever they met, this secret negotiation was usually a subject of merriment and exultation, that the British were so completely, and so long deceived, to their own injury, and our advantage. As I have said, I must be a very incompetent judge of the weight of the evidence which Mr. Stone has adduced, to prove a charge which I knew to be unfounded. Surely then, the reader will think it quite reasonable, that I submit the evidence to his better judgment, with such remarks as to its relevancy and weight as shall occur to me.

To do this fairly, and to enable the reader to form a satisfactory opinion in the case, I regret that it is necessary to make the following long extract from the second volume of the "Life of Brant," p. 137.

"A summary view of the controversy between New York and the people of the New Hampshire Grants, has already been given; in addition to which, several incidental allusions have been made to the equivocal movements and intentions of Ethan Allen. Reference was also made, by way of a note in the preceding chapter, to a special message from Governor Clinton to the legislature of New York, communicating important information respecting the designs of Allen and his associates, which had been derived from two prisoners who had escaped from Canada in the autumn of the present year—John Edgar and David Abeel. The substance of the statements of these men was, that several of the leading

men of the New Hampshire Grants were forming an alliance with the king's officers in Canada. Among these leaders were Ethan and Ira Allen, and the two Fays. A man named Sherwood, and Doctor Smith of Albany, whose name has already been mentioned, were the agents of the negotiation on the part of Great Britain; and their consultations were sometimes held at Castleton, on the Grants, and sometimes in Canada. According to the statement of Edgar, it was understood that the Grants were to furnish the king with a force of two thousand men. Mr. Abeel's information was, that fifteen hundred was the number of men to be furnished, under the command of Ethan Allen. Mr. Abeel also stated, that Ethan Allen was then in Canada upon that business, and that he had seen Major Fay at the Isle au Noix, on board of one of the king's vessels; and that he, Fay, had exchanged upward of thirty Hessians, who had deserted from Burgoyne's army, delivering them up to the British authorities. The statements of Edgar and Abeel, the latter of whom had been taken a prisoner at Catskill the preceding spring, were given under the sanction of an oath; and, although they were not fellow-prisoners,—and although they had derived their information from different sources,—and although escaping at different times, under dissimilar circumstances, and by routes widely apart,—yet there was a strong coincidence between them. A third account, submitted to the legislature by the governor, was somewhat different, and more particular as to the terms of the proposed arrangement. In this paper, it was stated, first, that the territory

claimed by the Vermontese should be formed into a distinct colony or government. Secondly, that the form of government should be similar to that of Connecticut, save that the nomination of governor should be vested in the crown. Thirdly, that they should be allowed to remain neutral, unless the war should be carried within their own territory. Fourthly, they were to raise two battalions, to be in the pay of the crown, but to be called into service only for the defence of the colony. Fifthly, they were to be allowed a free trade with Canada. General Haldimand had not deemed himself at liberty to decide definitely upon propositions of so much importance, and had accordingly transmitted them to England for the royal consideration. An answer was then expected. Such was the purport of the intelligence; and such was the weight of the testimony, that the governor did not hesitate to assert that they "proved a treasonable and dangerous intercourse and connection between the leaders of the revolt in the north-eastern part of the state and the common enemy."

The fact is, according to the admissions, and the documents published, by the Vermont historians themselves, that the people of Vermont, though doubtless for the most part attached to the cause of the country, nevertheless looked upon New York "as a more detested enemy" than Great Britain; and the officers of the latter were not slow in their efforts to avail themselves of the schism. Accordingly, Colonel Beverly Robinson sought to open a correspondence with Ethan Allen as early as March, 1780. The first letter was handed to Allen in Arlington, but was not

answered. A second letter from Robinson was received by Allen in February, 1781, which, with the first, he enclosed to congress in March, accompanied by a letter, plainly asserting the right of Vermont to agree to a cessation of hostilities with Great Britain, provided its claims, as a State, were still to be rejected by congress. It does not appear, however, that the threat had any effect upon that body.

“In the months of April and May following, the governor and council of Vermont commissioned Colonel Ira Allen, a brother of Ethan, to proceed to the Isle au Noix, to settle a cartel with the British in Canada, and also, if possible, to negotiate an armistice in favor of Vermont. The arrangements for this negotiation were conducted with the most profound secrecy, only eight persons being cognizant of the procedure. Colonel Allen, accompanied by one subaltern, two sergeants, and sixteen privates, departed upon his mission on the first of May, and, having arrived at the Isle au Noix, entered at once upon his business; negotiating with Major Dundas, the commander of that post, only on the subject of an exchange of prisoners, but more privately with Captain Sherwood and George Smith, Esq., on the subject of an armistice. The stay of Allen at the island was protracted for a considerable time, and the conferences with the two commissioners, Sherwood and Smith, on the subject of the political relations of Vermont, were frequent, but perfectly confidential; Allen carefully avoiding to write anything, to guard against accidents. But, from the beginning, it seems to have been perfectly understood, by both parties,

that they were treating 'for an armistice, and to concert measures to establish Vermont as a colony under the crown of Great Britain.' In the course of the consultations, Allen freely declared 'that such was the extreme hatred of Vermont to the State of New York, that, rather than yield to it, they would see congress subjected to the British government, provided Vermont could be a distinct colony under the crown on safe and honorable terms.' He added, 'that the people of Vermont were not disposed any longer to assist in establishing a government in America, which might subject them and their posterity to New York, whose government was more detested than any other in the known world.' These were encouraging representations in the ears of his majesty's officers; and, after a negotiation of seventeen days, the cartel was arranged, and an armistice verbally agreed upon, by virtue of which hostilities were to cease between the British forces and the people under the jurisdiction of Vermont, until after the next session of the legislature of Vermont, and even longer, if prospects were satisfactory to the commander-in-chief in Canada. Moreover, as Vermont had then extended her claims of territory to the Hudson River, all that portion of New York lying east of the river, and north of the western termination of the north line of Massachusetts, was included in the armistice. It was also stipulated, that, during the armistice, the leaders in Vermont were to prepare the people by degrees for a change of government, and that the British officers were to have free communication through the territory of the new State, as it claimed to be.

“But, notwithstanding the veil of secrecy drawn over the proceedings, dark suspicions got afloat that all was not right. The sincere whigs among the people of the Grants became alarmed, and were apprehensive that they might be sold ere yet they were aware of it. When the legislature met, the people, whose jealousies had been awakened, flocked to the place of meeting, to ascertain whether all was well; and it was only by much dissimulation on the part of those who were in the secret, that the friends of the Union were pacified. There were also other spectators present, from different States, who felt an equal interest to ascertain whether the great cause of the nation was not in danger of being compromised. The result was, that the agents succeeded in throwing dust into the eyes of the people; and so adroit was their management, that the Allens held communication with the enemy during the whole summer, without detection. On more than one occasion, British guards, of several men, came to the very precincts of Arlington, delivering and receiving packages in the twilight.

“In September the negotiations were renewed, the commissioners of both parties meeting secretly at Skenesborough, within the territory of New York, and further progress was made in the terms of the arrangement, by which Vermont was in due time to throw herself ‘into the arms of her legitimate sovereign.’ Sir Frederick Haldimand, however, was becoming impatient of longer delay; and a strenuous effort was made for an immediate and open declaration on the part of Vermont. To this proposition

the Vermont commissioners, Ira Allen, Joseph Fay, and a third person, whose name is not given, pleaded that there had not yet been time to prepare the people for so great a change, and that they should require the repose of the approaching winter for that object. It was at length stipulated, however, that, inasmuch as the royal authority had been received by Sir Frederic Haldimand for that purpose, an army might ascend the lake, with proclamations offering to confirm Vermont as a colony under the crown, upon the principles and conditions heretofore indicated, on the return of the people to their allegiance; the commissioners interposing a request, that the general commanding the expedition would endeavor to ascertain the temper of the people before the proclamation should be actually distributed. The legislature of the Grants assembled at Charlestown in October. Meantime, General St. Leger, agreeably to the arrangement with Allen and Fay, ascended the lake to Ticonderoga, with a strong force, where he rested. In order to save appearances, the Vermontese had stationed a military force on the opposite shore, under the command of General Enos, to whom was necessarily confided the secret. But on neither side would it answer to confide the secret to the subordinates. *They* must, of course, regard each other as enemies in good faith; and the fact that they did so consider themselves was productive of an affair, which placed the Vermontese in a peculiarly awkward predicament. The circumstances were these: In order to preserve at least the mimicry of war, scouts and patrols were occasionally sent out by both parties. Unluckily,

one of these Vermont patrols happened one day to encounter a similar party from the army of St. Leger. Shots were exchanged with hearty good will; the Vermont sergeant fell, and his men retreated. The body was decently interred by order of General St. Leger, who sent his clothes to General Enos, accompanied by an open letter, apologizing for the occurrence, and expressing his regret at the result. It was hardly probable that an unsealed letter would pass through many hands, and its contents remain unknown to all save the person to whom it was addressed. Such, certainly, was not the fact in regard to the letter in question. Its contents transpired; and great was the surprise at the civility of General St. Leger, in sending back the sergeant's clothes, and deploring his death. A messenger was despatched by General Enos to Governor Chittenden at Charlestown, who, not being in the secrets of his employers, failed not, with honest simplicity, to proclaim the circumstances of the sergeant's death, and the extraordinary message of General St. Leger. The consequence was excitement among the people assembled at Charlestown, attended with a kindling feeling of distrust. 'Why should General St. Leger send back the clothes?' 'why regret the death of an enemy?' were questions more easily asked by the people than capable of being safely and ingenuously answered by their leaders. The consequence was, a popular clamor unpleasant to the ears of the initiated. Major Runnels confronted Colonel Ira Allen, and demanded to know why St. Leger was sorry for the death of the sergeant. Allen's answer was evasive and un-

satisfactory. The major repeated the question, and Allen replied that he had better go to St. Leger at the head of his regiment, and demand the reason for his sorrow in person. A sharp altercation ensued, which had the effect, for a short time, of diverting the attention of the people from the despatches, which they had been clamoring to have read. These were precious moments for the governor and the negotiators with the enemy. The board of war was convened, the members of which were all in the secret, and a set of pretended letters were hastily prepared, from such portions of General Enos's despatches as would serve the purpose in hand, which were read publicly to the legislature and the people, and which had the effect of allaying the excitement and hushing suspicion into silence.

“Meantime, a rumor of the capture of Cornwallis and his army at Yorktown was wafted along upon the southern breeze; the effect of which was such upon the people, as to induce Allen and Fay to write to the British commissioners with St. Leger, that it would be imprudent, at that particular conjuncture, for him to promulgate the royal proclamation, and urging delay to a more auspicious moment. The messenger with these despatches had not been longer than an hour at the head-quarters of St. Leger at Ticonderoga, before the rumor respecting Cornwallis was confirmed by an express. The effect was prodigious. All ideas of further operations in that quarter were instantly abandoned; and, before evening of the same day, St. Leger's troops and stores were re-embarked, and, with a fair wind, he made sail immediately back to St. Johns.

“From this narrative of facts, as disclosed in London, many years afterward, by Colonel Ira Allen himself, it will be seen at once that General Heath was in error, when, in his general orders of November 9th, he attributed the inaction of General St. Leger, and his ultimate retreat, to the preparations of Lord Stirling and Generals Stark and Gansevoort for his reception.

“The digression which has been judged necessary, to elucidate this portion of the operations in the north during the summer and autumn of 1781, may by some readers be thought wide of the leading design of the present work. Still, it is believed that, to a majority of the public, the facts detailed in this connection will be new, as they must be curious in the estimation of all. They are, at the same time, held to be essential to a just appreciation of the difficulties with which the military officers in the northern department, and the government of the State of New York, were obliged to contend during the period under consideration. Strong light is also reflected by them upon that portion of the history of the war itself with which they are interblended. Every close reader of American history is aware that there was a correspondence, of some description, between the leaders of the people occupying the New Hampshire Grants and the common enemy, during the later years of the revolutionary war. But neither the precise character, nor the extent, of that correspondence, has been generally understood; while it has, for obvious reasons, been the desire of those most directly concerned in those matters, to represent the

whole as a game of dissembling with an enemy who had attempted to tamper with the patriotic sons of the Green Mountains.¹ Be this as it may, it is in the secret proceedings of the Vermont conspirators, that the key is found to the mysterious movements of the enemy on Lake Champlain, which had so greatly harassed the American commanders at the north during that autumn."

We will take the author's statement of the question which he has decided, and which we propose to examine. Were Governor Chittenden and the leading men of Vermont, in their secret negotiations with the British, playing a game of dissembling with an enemy who had attempted to tamper with the patriotic sons of the Green Mountains, or had those leading men a serious intention to listen to the proposals of the British? The author has decided this question against the leading men of Vermont, — that they had a serious intention to listen to the proposals of the British. As this decision is a reversal of the decision made by Sparks and others, it must

¹ "Sparks, adopting the views of earlier writers, has noticed the case in this favorable aspect, in his late sketch of the life of Ethan Allen. The author certainly agrees with Mr. Sparks in the opinion that 'there was never any serious intention, on the part of the Vermontese, to listen to the British proposals.' But, with great deference, after a full examination of the case, the same cannot be said of the leaders of the Vermontese. They had determined that New York should be dismembered; and, if they could not force themselves into the confederation as a state, they were willing to fall back into the arms of Great Britain as a colony. But it is very certain, from the conduct of the people of the Grants when they heard of St. Leger's regrets at the killing of the sergeant, that they were prepared for no such arrangement."

be taken that Mr. Stone has stated all the evidence on which he founded his opinion; and it seems that he considered most of it as new-discovered evidence, unknown to those who had formed a different opinion in the case. Such, I understand, is the evidence of Edgar and Abeel, on which great reliance seems to be placed. A statement of facts is made to establish their credibility, or rather to remove all suspicion that they might have been connected together, and fabricated their testimony. Now, had their evidence the least bearing on the point in question, I should not hesitate to say that it is deserving of no credit whatever. Where, and how, were the thirty Hessian deserters from Burgoyne's army caught by Major Fay, to be delivered up to the British authorities? Great numbers of the German soldiers, principally young men, who took a fancy to this country, and determined not to return to their father-land, deserted from Burgoyne's army after the capture, and settled in all parts of New England. But how, and by whom, was Major Fay authorized to seize these peaceable citizens, for such they were, and deliver them up to the British authorities? And, surely, it was not by their own consent that they were delivered up for punishment. This part of the testimony of these witnesses, then, is a sheer fabrication, and discredits their whole testimony. But, as before hinted, it is wholly unnecessary to impeach these witnesses, for the obvious reason that, if true, their testimony has no bearing on the point in question. It only proves what was known to all, and admitted by all, that the leading men in Vermont entered into

a secret negotiation with the British authorities in Canada, and nothing more ; having no tendency to prove with what design they entered into that negotiation.

The next evidence, is a more particular account of the negotiation communicated to the legislature of New York by Governor Clinton, if, indeed, it can be considered as evidence, it being only the declaration of Governor Clinton, that such was the purport of the intelligence which he had received, and such was the weight of the testimony, referring, of course, to the testimony of Edgar and Abeel, that he did not hesitate to assert that they proved a treasonable and dangerous intercourse and connection between the leaders of the revolt, in the north-eastern part of the state, and the common enemy. It is obvious that this adds nothing to the testimony of Edgar and Abeel, except the opinion of Governor Clinton. And this without the slightest imputation upon the governor, we may say, is deserving of no weight. Extremely jealous as he was of the people of Vermont, information of a secret negotiation between them and the common enemy, would, to his mind, be the clearest evidence of treason. Indeed, every one whose mind was unbiased, being informed only of the existence of the secret negotiation, would have formed the same opinion.

The author then states the fact, that the people of Vermont, although doubtless for the most part attached to the cause of their country, nevertheless looked upon New York as a more detested enemy than Great Britain ; a statement not exactly in accordance

with the final decision of the author. The next evidence is, that in the month of March, 1780, Ethan Allen received a letter from Beverly Robinson, a British officer, of which letter it does not appear that any notice was taken. But on the receipt of a second letter from Robinson in February, 1781, Allen transmitted both letters to congress, accompanied by a letter from himself, in which he asserted the right in Vermont to agree to a cessation of hostilities with Great Britain, provided its claims as a state were still to be rejected by congress. It does not appear, says the author, that the threat had any effect upon that body. And why? Because congress knew that traitors never truly disclose their designs to those whom they are betraying. The next evidence is a more detailed account of the negotiation at the Isle au Noix. The author says, that in the course of the consultation, Ira Allen freely declared, that such was the extreme hatred of Vermont to the state of New York, that rather than yield to it, they would see congress subjected to the British government, provided Vermont could be a distinct colony under the crown, on safe and honorable terms. He added, that the people of Vermont were not disposed any longer to assist in establishing a government in America, which might subject them and their posterity to New York, whose government was the most detested in the known world. These, it is said, were encouraging representations in the ears of his majesty's officers. They were so, because Allen forgot to relate the concluding part of the story — that nothing on earth could ever induce the people of Vermont to submit either to the govern-

ment of New York or to the government of Great Britain. After a negotiation of seventeen days, an armistice was verbally agreed upon, by virtue of which, hostilities were to cease between the British forces and the people of Vermont until after the next session of their legislature.

It is unnecessary to examine the evidence contained in the extract any farther in detail ; but the reader is requested to examine it, and if he can find any fact proved, or even stated, inconsistent with the allegation that the leading men in Vermont were only playing a game of dissembling with the enemy, having no intention of listening to their proposals, let it be noted, and have its due weight. It is presumed, however, that he will find nothing of the kind, and that he will take this general view of the subject. The British authorities in the province of Canada, knowing that for a number of years a bitter contention had existed between the people of Vermont and the government of New York, and knowing, also, as they undoubtedly did know, that congress had passed a resolution, declaring that the independent government, attempted to be established in Vermont, could derive no countenance or support from any act or resolution of congress ; and being deceived, as the British were, through the whole of the revolutionary war, in relation to the number of loyalists in the States, and having no adequate knowledge of their rebellious subjects, they naturally compared them to a British mob ; an ignorant, unstable, changeable multitude, who might be easily induced to return to their allegiance under the crown ; and they had no

doubt but that the people of Vermont might be induced to separate themselves from the United States, and become a British colony. Entertaining these views, the two letters were written by Robinson to Allen, proposing an armistice. Governor Chittenden, and other leading men in Vermont, being consulted, it was concluded that something might be made out of these letters by transmitting them to congress, at the same time asserting the right of Vermont to agree to a cessation of hostilities with Great Britain, calculating that congress might be induced to delay a decision in favor of New York, lest they might drive Vermont to form a connection with the British, especially as congress had been divided on all questions relating to Vermont. And who will say that their calculations wholly failed as to the effect of their proceedings upon congress? Without adverting to these proceedings, who will undertake to account for the singular, vascillating policy of congress in relation to Vermont during the whole of the revolutionary war. The leading men in Vermont had a still stronger inducement to agree with the British on an armistice. Our frontiers were exposed to the enemy, who then had in the province of Canada a disposable force of seven thousand men. But an armistice is agreed on by belligerents, with a view to ulterior arrangements. To induce the British, then, to agree upon an armistice, it was necessary on the part of Vermont to make such propositions to them as they should think would be advantageous to themselves, and such as might appear to be made with sincerity on the part of Vermont. And

what propositions could be made more advantageous to the British, or more natural on the part of Vermont, than the proposition that Vermont should detach herself from the United States and become a British province. Accordingly this proposition was made and an armistice agreed on. How natural, then, was the declaration of Ira Allen, during his negotiation with the British at the Isle au Noix. The author says, that Allen *freely* declared, &c.; the word *freely* is evidently used to give to the transaction a darker shade; but he might have given the transaction a much darker shade, in his own view, had he said that Allen declared in the most positive manner, and it would also have been more correct. For Allen's object was to impress on the minds of the British negotiators the strongest conviction that the leading men in Vermont had fully determined to detach themselves from the United States, and join the British in the war of the revolution. And Allen was not a man to fail for want of a sufficient degree of assurance. These observations apply to all the declarations and transactions related in the extract; and, on the ground that it was all a game of dissembling to deceive the British, never was a more natural, artful and politic course pursued. But they met with the greatest difficulty in furnishing a satisfactory excuse to the British for their delay in bringing the business to a final conclusion. And this was indispensable; for the moment they were brought to this point, there must have been an end of the armistice. And the only excuse for delay which presented itself, was, that the people of Vermont were not prepared; that

time was required to bring them over to their views. A great length of time must have been required for this, for nothing can be more clear, than that the leading men in Vermont never made a single effort, even to abate the ardor of the people in the cause of their country. Nothing of the kind was suspected at the time ; no writer since, has noticed the subject at all, nor has Mr. Stone himself even stated anything of the kind. On the contrary, it appears by his note at the close of the extract, that he considered that the body of the people of Vermont remained uncorrupted and steadfast in the cause of their country to the last. We have seen how sensitive the people were on the subject of a negotiation with the governor of Canada, and this as late as October, 1781. Certain it is, then, that if any efforts had been made to abate their ardor in the cause of their country, they had been singularly unsuccessful. But all who knew Governor Chittenden, knew that he never could have made an effort of the kind. True, he had a commanding influence with the people, but he had acquired that influence by his zeal in the cause of his country, and his unremitted exertions to establish the independence of the United States. And all have admitted that he was a man of great sagacity, and distinguished for his profound knowledge of human nature. And surely he had some knowledge of his own Green Mountain Boys. He knew well of what stuff they were made. Could he then ever have thought of making tories out of such materials? No. He never thought of making an effort of the kind. And it is believed, that in the year 1781, there was

scarcely a tory within the limits of Vermont. What tories there were in this territory at the commencement of the war of independence, separated themselves from the whigs in the year 1777, and joined the enemy, when they were in possession of a part of this state. I have dwelt longer on this part of the subject, because the reader will perceive that if I am correct in this, that the leading men of Vermont never made any effort to induce the people to abandon the cause of their country and join the British — the question which we have been discussing is conclusively and finally settled. For these leading men well knew that if, by their secret negotiations, they made Vermont a British province, without the concurrence of the people, they would negotiate *themselves* into perpetual exile — if fortunate enough to escape a more summary punishment.

Before coming to a conclusion, I cannot but state one fact which strikingly marks the character of our fathers.

It appears very clearly, that through the whole of their negotiation with the British, they made not a single profession of loyalty to the British crown, or of attachment to the British government, or uttered an expression of dislike to our free institutions. Such was the strength of their moral principles, and so fixed their habit of adhering to the truth, that they could not at once learn how to utter a palpable falsehood. On a full and impartial view of the whole subject, it appears that the reader will arrive at the following conclusions: That the British authorities in Canada proposed to the leading men in Vermont

a cessation of hostilities between the British forces and the people of Vermont, with a view to a negotiation by which Vermont should be detached from the United States, and become a British province. The leading men in Vermont being thus invited by the British to desert their country and join their enemies, felt themselves at liberty to accept of the proposals of the British for an armistice, and by means of deception to continue it so long as they should find it advantageous; that they played their game so adroitly, and deceived the British so completely, that they were enabled to continue the armistice by which our frontiers were secured against the assaults of the enemy, until the close of the war, to the great advantage of the United States as well as this state. Thus, the British, undertaking to tamper with the patriotic sons of the Green Mountains, found their match, and were so completely duped and deceived, that their enemies alone were benefited by the armistice. The actors on the part of Vermont will ever be admired and applauded for their wisdom and patriotism. And the character of Thomas Chittenden, Nathaniel Chipman and their compatriots, will pass down through succeeding ages, to the last generations of men, as fair and untarnished as they were during their lives, and, as I trust, they appeared when called to give an account to that Being who had been graciously pleased to crown with complete success all their noble and patriotic exertions in the cause of their country — the cause of liberty and the rights of man.¹

¹ The reader will find some further evidence upon the subject discussed in this chapter, in a letter from Governor Chittenden to General Washington, in the Appendix, No. VII.

CHAPTER III.

Occasion and beneficial Operation of the Quieting Act — Mr. Chipman unsuccessful in his Farming and other Business — Resolution of the Legislature, by which certain Measures proposed for the Relief of the People calculated only to increase and prolong their Sufferings, were postponed and defeated — Elected Assistant Judge of the Supreme Court.

WHEN the government was organized in this state, and justice began to be administered, it was soon found that a great portion of the settlers had purchased defective titles. A long time had elapsed between the granting of the lands by New Hampshire and the organization of government in this state, during the whole of which time there was no office in which deeds could be recorded; and there was no place to which the purchaser could resort to ascertain in whom was the legal title to the lands, which he proposed to purchase. And in New England, purchasers were not accustomed to receive the title deeds, so as to have in their hands evidence of the title. Consequently it was soon found, that a man so disposed, could sell lands as well without the expense of a purchase as with. A number of swindlers took advantage of this state of things, and made a business of selling lands without making a single purchase. Simeon Sears was one of these primitive swindlers.

The following anecdote will show how notorious this mode of swindling had become. The City Hall in Albany was but thirty miles from Bennington, and some of the people of Bennington had been confined in it by the authorities of New York. The City Hall, of course, became a hated place, and an object of dread to the Green Mountain Boys, the more so after the act of outlawry against Allen and others. It therefore became a subject of conversation at all their meetings. At length they began to devise ways and means for destroying it. And at one of the meetings a number of modes of effecting this were proposed, and among the rest several modes of blowing it up. "No," said Ethan Allen, wishing to direct their attention from that dreaded object, "the better way will be to employ Sim Sears to sell the d—d thing."

A great portion of the people being thus exposed to eviction by those who had the legal title, it could not be supposed that they would support a government, by the operation of which they were to lose their farms, rendered more dear to them by their long and doubtful struggle with New York in their defence, and by the hardships and privations which they had suffered in bringing them into a state of cultivation ; and it was absolutely necessary that some relief should be provided for them. Governor Chittenden very early discovered this, and he was precisely the man to devise the best mode of relief. He had a strong sense of equity, and deeply sympathized with the unfortunate settlers. And what peculiarly fitted him for this occasion was, that he knew nothing of the technical niceties of the law. He therefore found nothing

in the way, nothing to prevent him from pursuing that course which was dictated by the principles of natural justice. And as the settlers had made improvements on their farms at great expense, thereby greatly enhancing the value, he could not endure the gross injustice of permitting the legal owner, who had stood aloof, to recover the land with the value thus enhanced by the hard labor of the settlers. He therefore proposed a law, giving to the settlers, in case of eviction, the full value of his improvements and half the rise of the land. A bill to this effect had been introduced several sessions before, but being opposed by almost all the lawyers in the state, it was postponed to the October session of the legislature at Rutland, in 1784. The law, they said, makes every man a trespasser who enters on the land of another without license, and subjects him to damages for the trespass; instead of this, you would compel the legal owner to pay him a bounty for his trespass. The bill was taken up again at this session, when Nathaniel Chipman was a member. But although there was a majority in favor of the principles of the bill, giving to the settler a remedy for his "betterments" against the legal owner, on a recovery in ejectment, yet they were not able to agree on the details of the bill. No wonder; for it was a new case. They could avail themselves of no precedent; they could resort to no form. Not being able to pass the bill at this session, and feeling a pressing necessity of passing it as soon as possible, the legislature had an adjourned session at Norwich, in June, 1785, that they might have time to mature and pass the bill, afterwards called the

quieting act. The bill was taken up at the adjourned session and referred to a committee, of which Nathaniel Chipman was a member. When the bill came into his hands, he revised it in such a manner, that it passed the house by a decided majority. His strong sense of justice, and his comprehensive and discriminating mind, enabled him as a legislator to adopt the law to any new state of things with the same ease with which, in the administration of justice, he applied the settled principles of law to new cases when they occurred, in such manner as to do perfect justice between the parties. Thus a law was passed by the legislature of Vermont, perfectly novel in its character, yet so clearly founded on the principles of natural justice, that it has always been in great favor with the people of this state, and several of our sister states availing themselves of our invention and our experience, have adopted the same system.

In the year 1782, his father conveyed to him his farm under a contract that he should support his father and stepmother during their lives, and educate his three younger brothers, which contract he fulfilled to the entire satisfaction of all concerned. But it proved to be an unfortunate contract for him. Instead of making his farm profitable, his lucrative practice was charged as well with the support of his farm as with the support of his family. He cultivated his farm with judgment, and never lost anything by visionary experiments; but his losses were occasioned by his absence from home a great part of the year, and by a want of that minute attention to the details of the business, which is indispensable to

render farming profitable. For the profits will ever be made of little savings of time and expense, and without such economy a loss is almost certain. And it may be doubted whether any one, whose mind is so engrossed in the acquisition of knowledge, can ever pay that minute attention to little things which is indispensable to render farming profitable. In the year 1785 or 1786, he erected a forge, and procured a store of goods to aid in carrying it on, and soon became deeply involved. His brother, Darius Chipman, who was in the practice of law at Rutland, then exchanged situations with him, removed to Tinmouth, and in a few years paid the debts. They again changed situations, and Nathaniel again occupied the old farm in Tinmouth. He again sustained a loss by farming, and sold his farm. During the remainder of his life, he depended on his pension for a support. When he published his work on Government, he was compelled to ask assistance from his relatives.

In the year 1786, the embarrassments and sufferings of the people, which have been adverted to, had increased and their passions had become more and more inflamed, until open resistance to the execution of the laws was apprehended. And when the legislature convened at Rutland in October, it appeared that the passions, prejudices and turbulence of the people were fully represented in the numerous house of representatives. Unfortunately, the constitution had provided no check upon that house, and, as was foreseen, it proved a stormy session. They passed, what was afterwards called, a specific tender act, obliging the

creditor to receive on execution, at their appraised value, such articles of personal property as the debtor had contracted to pay. But this was not satisfactory to those who were as destitute of such articles of property as they were of money. Some were clamorous for a general tender act, obliging the creditor to receive on execution any articles of personal property which should be tendered by the debtor. Others strenuously insisted on a bank of paper money, and there was great reason to fear that one or both these measures would be adopted by the legislature. Nathaniel Chipman, who was in Rutland at the time, and who had witnessed the temper of the legislature, became alarmed, being fully satisfied that the measures proposed, if adopted, must greatly increase and prolong the sufferings of the people. Being extremely anxious to devise some means by which these evils might be averted, he requested the following members of the legislature to meet at his room the next evening to hold a consultation on the subject, namely, Gideon Olin, of Shaftsbury; Elijah Dewey, of Bennington; Lemuel Chipman, of Pawlet, and Thomas Johnson, of Newbury. The first question which occurred, after they came together, was, Are there any other members of the legislature who can be trusted, and safely admitted to join in our deliberations? Several members were named, but not one, who in the opinion of those present, could be safely admitted. They were, therefore, compelled to rely on their own influence to carry such measures as they should devise. They then took a view of the whole ground; the grievances of the

people, both real and imaginary, their inflamed passions and the turbulent spirit of a great portion of them, the violence of the legislature, and the destructive nature of the measures which were proposed, and the probability of their adoption, unless they could be postponed. They unanimously agreed that the popular current was too strong to be resisted; that should they attempt to do this they would be swept along with it, and only add to its momentum, and render it more destructive; and that they could therefore do nothing to any good purpose, unless they could devise some means by which the proposed measures might be postponed until the passions of the people should have time to cool. Having this view of the subject, they drew up the resolution¹ and preamble, as stated in Thompson's Civil History of Vermont, page 79. The next day the resolution was introduced, and in support of it it was observed, that the sufferings of the people had become so severe, that some relief was absolutely necessary; and the great and important question was, what is the best mode of granting relief? Of this the people themselves are the most competent judges — it ought, therefore, to be submitted to their decision.

Some of the principal supporters of the measures before the legislature perceived the design of those

¹ Resolved, that the people assemble in their respective towns on the first day of January, 1787, at the usual places of holding freemen's meetings, and there express, by yea or nay, their approval or disapproval, of emitting a small bank of paper money, on loan or otherwise, of continuing the existing tender acts, and of a general tender act; the yeas and nays on these subjects to be transmitted to the speaker of the assembly, to be a guide to the legislature at their next session.

who supported the resolution; that their sole object was to delay and finally defeat their favorite measures. But those who supported the resolution, having the democratic side of the question, prevailed; the resolution passed, and the whole subject was postponed until the next session. I perceive here this singular coincidence. The above-named resolution passed on the 31st day of October, and on the same day a mob assembled at Windsor to stop the sitting of the county court.

At this session of the legislature, Nathaniel Chipman was elected assistant judge of the supreme court, the first lawyer elected a judge of that court. At the end of the year he returned to his practice at the bar. Situated as he was on the bench, one of five judges, and he the only lawyer, it is believed that he did not at that time become very distinguished as a judge.

CHAPTER IV.

Correspondence between Nathaniel Chipman and Alexander Hamilton —
Settlement of the Controversy with New York.

WHEN in the summer of the year 1788, it became evident that the constitution of the United States would be adopted by all the other states, and a national government established, the attention of the most intelligent men in the state was called to the peculiar situation of Vermont. To remain a small independent state, between the United States and the British province of Quebec was not to be thought of, and to join the union, our controversy with New York remaining unsettled, and to subject our landed titles to the decision of the federal court, was considered by many to be extremely hazardous. Nathaniel Chipman was always fearful that, if the question should ever be brought before an impartial tribunal for decision, the New York title would be adjudged the better title. He had, therefore, been opposed to the granting of lands by this state, which had before been granted by New York. Having this view of the subject, he felt extremely anxious to devise some means by which the controversy with New York might be speedily adjusted. And in the early part of July, a number of gentlemen, among whom were the late

Judge Morris, then of Tinmouth, and the late Judge Olin, of Shaftsbury, met at his house in Tinmouth to hold a consultation on the subject, and they took this view of it. They said that Hamilton, Schuyler, Harrison, Benson and other leading federalists in New York must be extremely anxious to have Vermont join the union, not only to add strength to the government, but to increase the weight of the northern and eastern states. This was, therefore, the most favorable time for settling the controversy with New York, and it was agreed that Nathaniel Chipman should write to Hamilton on the subject. As the convention was then sitting or about to convene at Poughkeepsie for the adoption of the United States constitution by New York, of which Hamilton, Schuyler, Harrison and Benson were members, it was concluded to send the letter by express. The letter was delivered to Hamilton while attending the convention, to which he returned an answer by the express.

Every fact relative to the adoption of the federal constitution by the State of New York must ever be interesting; for it was generally believed, at the time, that if that state should reject the constitution, the national government would not be established. I was the bearer of the letter to Mr. Hamilton, and arrived at Poughkeepsie while the convention which adopted the constitution was in session. I repaired to Mr. Hamilton's quarters, and delivered the letter. General Schuyler, Richard Harrison, and Egbert Benson, were present. When Mr. Hamilton had read the letter, and communicated the contents to the others present, they all appeared to feel a deep

interest in the subject, and made many inquiries relative to the people of Vermont, particularly whether they could be induced to make a fair compromise of the claims of New York. When I was about to retire, Mr. Hamilton said to me that, at a certain hour the next morning, he would have an answer to my brother's letter prepared. I accordingly called on Mr. Hamilton at the hour named, and received the answer. Some conversation took place relative to my journey to New York, and I took liberty to say to Mr. Hamilton that I should be inquired of in New York what the prospect was in relation to the adoption of the constitution, and to ask him what I should say to them. His manner instantly changed, appearing to feel an intense anxiety on the subject, and he answered, "God only knows. Several votes have been taken in the convention, and it appears that there are about two to one against us." I was about to retire, when he added, in a most emphatic manner, "Tell them that the convention shall never rise until the constitution is adopted." I went on to New York, and, within a very few days, intelligence was received that the convention had adopted the constitution. This intelligence appeared to electrify the whole population, and produced the splendid celebration of the event which I witnessed; the details of it would be here out of place. I was surprised that so great and so sudden a change in the convention had taken place, and heard nothing said of the means by which it had been effected. On my return to Vermont, my brother was absent, and I did not see him until my return from college

the next autumn. I then related to him the conversation with Mr. Hamilton, and expressed my surprise that the convention adopted the constitution so soon after that conversation; upon which he gave me the following explanation.

Governor George Clinton, who was president of the convention, and had a commanding influence in the state, was strenuously opposed to the adoption of the constitution; and Dr. Williams, of White Creek, now Salem, was an attached friend of Governor Clinton, and was, with him, opposed to the adoption of the constitution. Williams had great influence with nearly all the members of the convention from the northern part of the state. Of course, they were with him in the opposition. And thus, by the influence of Clinton and Williams, there was a decided majority of the convention opposed to the adoption of the constitution. Still, Hamilton did not despair of success, but made an effort to convince Williams that the establishment of the national government was indispensable to save the country from anarchy and total ruin; and he succeeded. Williams withdrew from the opposition, and brought with him most of the members from the northern part of the state. By this, a majority of the convention were found in favor of the constitution, and it was adopted by the State of New York.

The following is all the correspondence on this subject between Nathaniel Chipman and Alexander Hamilton, which is to be found:

NATHANIEL CHIPMAN TO ALEXANDER HAMILTON.

Tinnmouth, July 15, 1788.

SIR — Your character as a federalist, although personally unknown to you, induces me to address you on a subject of very great importance to the state of Vermont, of which I am a citizen, and from which, I think, may be derived a considerable advantage to the federal cause. Ten states having adopted the new federal plan of government, that it will now succeed is beyond a doubt. What disputes the other states may occasion, I know not. The people of this state, I believe, might be induced almost unanimously to throw themselves into the federal scale, could certain obstacles be removed. You are not unacquainted with the situation of a very considerable part of our landed property. Many grants were formerly made by the government of New York, of lands within this territory while under that jurisdiction. On the assumption of government by the people of this state, the same lands, partly it is said for want of information respecting the true situation of these grants, and partly from an opinion prevailing with some of our then leaders, that the New York grants within this territory were of no validity, have been granted to others under the authority of this state.

It is now generally believed, that, should we be received into the union, the New York grants would, by the federal courts, be preferred to those of Vermont. The legislature of this state have in some instances made a compensation to the grantees under New York ; and I am persuaded would do the same

for others were it in their power, but they are in possession of no more lands for that purpose. For these reasons, and I presume for no others, the governor and several gentlemen deeply interested in these lands granted by Vermont, have expressed themselves somewhat bitterly against the new federal plan of government. Indeed, were we to be admitted into the union unconditionally, it would produce much confusion. Now, sir, permit me to ask whether you do not think it probable that the federal legislature, when formed, might, on our accession to the union, be induced on some terms, to make a compensation to the New York grantees, out of their western lands, and whether those grantees might not be induced to accept such compensation? Let me further suggest, whether it might not be favorable for Vermont to make some of those amendments which have been proposed by several states, the basis of her admission?

Could the difficulties I have mentioned be removed, all interests in opposition would be reconciled; and the idea of procuring justice to be done to those whom we had, perhaps, injured by our too precipitate measures, and of being connected with a government which promises to be efficient, permanent and honorable, would, I am persuaded, produce the greatest unanimity on the subject. If you think these matters worthy the attention of the friends of the confederacy, be good enough to write by my brother, who will be the bearer of this. Our legislature will meet in October, when these matters will be taken up seriously. Several gentlemen of my acquaintance, who are men of influence and will be members of the legislature,

have requested me to procure all the information in my power on this subject. Anything which you may suggest to me in confidence will be sacredly attended to, of which Mr. Kelley, who writes by the same opportunity, will give you the fullest assurance.

I am, with great respect,

Your obedient, humble servant,

NATHANIEL CHIPMAN.

MR. HAMILTON.

ALEXANDER HAMILTON TO NATHANIEL CHIPMAN.

Poughkeepsie, July 22, 1788.

SIR — Your brother delivered me your letter of the 15th inst. which I received with pleasure, as the basis of a correspondence that may be productive of public good.

The accession of Vermont to the confederacy is doubtless an object of great importance to the whole ; and it appears to me that this is the favorable moment for effecting it upon the best terms for all concerned. Besides more general reasons, there are circumstances of the moment which will forward a proper arrangement. One of the first subjects of deliberation with the new congress will be the independence of Kentucky, for which the southern states will be anxious. The northern will be glad to find a counterpoise in Vermont. These mutual interests and inclinations will facilitate a proper result.

I see nothing that can stand in your way but the interfering claims under grants of New York. As to taxation, the natural operation of the new system will place you exactly where you might wish to be.

The public debt, as far as it can prudently be provided for, will be by the western lands, and the appropriation of some general fund. There will be no distribution of it to particular parts of the community. The fund will be sought for in indirect taxation; as, for a number of years, and except in time of war, direct taxes will be an impolitic measure. Hence, as you can have no objection to your proportion of contribution as consumers, you can fear nothing for the article of taxation.

I readily conceive, that it will be scarcely practicable for you to come into the union, unless you are secured from the claims under New York grants. Upon the whole, therefore, I think it will be expedient for you, as early as possible, to ratify the constitution, upon condition that congress shall provide for the extinguishment of all existing claims to land under grants of the State of New York, which may interfere with claims under the State of Vermont.

You will do well to conform your boundary to that heretofore marked out by congress, otherwise insuperable difficulties would be likely to arise with this state. I should think it altogether unadvisable to annex any other condition to your ratification. For there is scarcely any of the amendments proposed that will not have a party opposed to it; and there are several that will meet with a very strong opposition; and it would therefore be highly inexpedient for you to embarrass your main object by any collateral difficulties. As I write in convention, I have it not in my power to enlarge.

You will perceive my general ideas on the subject.

I will only add, that it will be wise to lay as little impediment as possible in the way of your reception into the union.

I am, with much esteem, sir,
Your obedient, humble servant,

A. HAMILTON.

MR. CHIPMAN.

ALEXANDER HAMILTON TO NATHANIEL CHIPMAN.

SIR, — Your favor of the sixth of September has been duly handed to me, and I receive great pleasure from the hopes you appear to entertain of a favorable turn of affairs in Vermont in regard to the new government. It is certainly an object of mutual importance to yourselves and to the union, and well deserves the best endeavors of every discerning and good man.

I observe with satisfaction your opinion that Vermont will not make a point of introducing amendments, (I mean as a condition of their accession.) That ground would be the most hazardous which she could venture upon, as it is very probable that such amendments as might be popular, with you, would be deemed inadmissible by the friends of the system, who will doubtless be the most influential persons in the national councils, and who would rather submit to the inconvenience of your being out of the union till circumstances should alter, than consent to anything that might impair the energy of the government.

The article of taxation is, above all, the most delicate thing to meddle with, for a *plenary* power

in that respect must ever be considered as the vital principle of government; no abridgment or constitutional suspension of that power can ever, upon mature consideration, be countenanced by the intelligent friends of an effective national government. You must, as I remarked in my former letter, rely upon the natural course of things, which, I am satisfied, will exempt you, in ordinary times, from direct taxation, on account of the difficulty of exercising it in so extensive a country, so peculiarly situated, with advantage to the revenue, or satisfaction to the people. Though this difficulty will be gradually diminished, from various causes, a considerable time must first elapse; and, in the interim, you will have nothing to apprehend on this score.

As far as indirect taxation is concerned, it will be impossible to exempt you from sharing in the burthen, nor can it be desired by your citizens. I repeat these ideas to impress you the more strongly with my sense of the danger of touching this cord, and of the impolicy of perplexing the main object with any such collateral experiments; while I am glad to perceive that you do not think that your people will be tenacious on the point.

It will be useless for you to have any view in your act to the present congress; they can, of course, do nothing in the matter. All you will have to do will be to pass an act of accession to the new constitution, on the conditions upon which you mean to rely. It will then be for the new government, when met, to declare whether you can be received on your terms or not.

I am sorry to find that the affair of the boundary is likely to create some embarrassment. Men's minds everywhere out of your state, are made up upon, and reconciled to that which has been delineated by congress. Any departure from it must beget new discussions, in which all the passions will have their usual scope, and may occasion greater impediments than the real importance of the thing would justify. If, however, the further claim you state, cannot be gotten over, with you, I would still wish to see the experiment made, though with this clog; because I have it very much at heart that you should become a member of the confederacy. It is, however, not to be inferred that the same disposition will actuate every body. In this state the pride of certain individuals has too long triumphed over the public interest, and in several of the southern states a jealousy of northern influence will prevent any great zeal for increasing in the national councils the number of northern voters. I mention these circumstances, (though I dare say they will have occurred to you,) to show you the necessity of moderation and caution on your part, and the error of any sanguine calculation for a disposition to receive you at any rate. A supposition of this nature might lead to fatal mistakes. In the event of an extension of your boundary by another congressional will, would it be impracticable for you to have commissioners appointed to adjust any difference which might arise? I presume the principal object with you in the extension of your boundary, would be to cover some private interests. This might be matter of negotiation. There is

one thing which I think it proper to mention to you, about which I have some doubts, that is, whether a *legislative* accession would be deemed valid. It is the policy of the system to lay its foundation on the immediate consent of the people. You will best judge how far it is safe or practicable to have recourse to a convention. Whatever you do, no time ought to be lost. The present moment is undoubtedly critically favorable. Let it by all means be improved. I remain, with esteem, sir,

Your obedient and humble servant,

A. HAMILTON.

The author of the Life of Hamilton states that there is no date to my brother's letters ; indeed, from the rapidity with which he wrote, and the pressure of his engagements, this omission is not an infrequent occurrence.

The foregoing correspondence prepared the way for a settlement of the controversy with New York. In the winter following, Mr. Hamilton and Mr. Chipman had an interview at Albany, when they took a view of the subject somewhat different from their views, which appear in the foregoing correspondence, and agreed on a mode of settling the controversy, which was afterwards adopted by the two states. The legislature of New York, on the 15th day of July, 1789, passed an act appointing Robert Yates, John Lansing, Gulian Verplanck, Simeon De Witt, Egbert Benson and Melancthon Smith, commissioners, with full powers to acknowledge the sovereignty of Vermont, and to adjust all matters of con-

troversy between the two states. And on the 23d of October following, the legislature of Vermont passed an act, appointing Isaac Tickenor, Stephen R. Bradley, Nathaniel Chipman, Elijah Paine, Ira Allen, Stephen Jacob and Israel Smith, commissioners, on the part of Vermont, to treat with those of New York, and to remove all obstructions to the admission of Vermont into the federal union. The commissioners of the two states met and adjusted all matters of controversy between them; and on the 7th day of October, 1790, the commissioners, on the part of New York, declared the consent of the legislature of that state that the State of Vermont be admitted into the union of the United States of America. And that immediately *on such admission*, all claims of jurisdiction by the State of New York, within the State of Vermont shall cease, &c. It was further agreed and declared, that if the legislature of the State of Vermont should, on or before the 1st day of January, 1792, declare that on or before the 1st day of June, 1794, the State of Vermont would pay to the State of New York the sum of thirty thousand dollars, immediately from such declaration by the legislature of Vermont, all rights and titles to lands within the State of Vermont, under grants from the government of the Colony of New York, or from the State of New York should cease, those excepted which were made in confirmation of the New Hampshire grants. The legislature of the State of Vermont raised the sum of thirty thousand dollars, by a general land tax, and paid it to the State of New York within the time limited for the payment.

CHAPTER V.

Convention called, by which Vermont acceded to the Union — Speech of Nathaniel Chipman in the Convention — Admission of Vermont to the Union.

THE controversy with New York having been thus adjusted, the legislature of Vermont called a convention to decide the question, whether Vermont should accede to the union. This convention met at Bennington on the 6th day of January, 1791; Nathaniel Chipman was a member of the convention, and delivered the following speech, urging the accession of Vermont to the union.

MR. PRESIDENT, — The subject on which we are now called to deliberate is a subject of great moment, and is attended with many weighty considerations. I shall waive at present the particular circumstances in which we may be supposed to stand with the United States, on account of the claims of New York, and the late compromise between Vermont and that state. I shall first make a few observations on our local and relative situation as a state, and the probable consequences that would attend the event either of our continuing independent, or of our acceding to the Union. I will then briefly remark on the principles and tendency of the federal constitution.

In viewing our situation, the first thing that strikes the mind is the limited extent of our territory, inadequate to support the dignity or defend the rights of an independent sovereignty, and the fortune that usually attends such petty sovereignties.

The division of an extensive country into small independent sovereignties greatly retards civil improvement. This was formerly the case in Europe; and the consequence was, a long continuance in savage, and almost brutal manners. It has been found that, where, through an extensive territory, the smaller sovereignties have united under one general government, civilization has proceeded more rapidly, and the kindly affections have much sooner gained the ascendancy, than where the country still continued under numerous neighboring governments. The reason why the one state is more favorable to civilization than the other, is founded in the constitution of human nature. Among small, independent states, as among independent individuals, without a common judge, the weak will be jealous of the strong, and will endeavor, by art and cunning, to supply the want of power. The strong will be ready to decide everything by force, according to their present interest. Hence follow a total want of national faith, recriminations, animosities, and open violence, under the idea of reprisals; and *foreigner* becomes but another name for an *enemy*. In this situation, the minds of men are kept in a constant state of irritation. Their turbulent spirits ill brook the restraint of laws. The passion of revenge, which, in proportion to the weakness of the govern-

ment, becomes necessary for the protection of the individual, is soon inflamed to a degree of enthusiasm. Common danger alone, and that imminently impending, can suspend its baneful operation among the members of the same society;—a situation fit only for savages, and in this situation savages have ever existed. But, in an extensive government, national prejudices are, in a great measure, suppressed. Hostilities are removed to a distance; private injuries are redressed by a common judge. The passion of revenge, no longer necessary for the protection of the individual, is suspended. The people no longer behold an enemy in the inhabitants of each neighboring district. They find all members of one great family, connected by all the ties of interest, of country, affinity, and blood. Thus are the social feelings gratified, and the kindly affections expanded and invigorated.

Vermont, continuing independent, would not be liable to all the evils which I have enumerated, in their full extent; but, as a small state, she will be liable to many and great inconveniences. In the vicinity, and almost encircled by the United States, now become great and powerful by means of an energetic system of government, our intercourse will be on very unequal, and frequently on very mortifying terms. Whenever our interests clash—and clash they will, at some times—with the interests of the union, it requires very little political sagacity to foresee that every sacrifice must be made on our part. When was it ever known that a great and powerful nation sacrificed, or even compromised her

interest, in justice to a weak neighbor, who was unable to make an effectual demand? Nay, such is the nature of mankind, were they disposed to judge candidly in such circumstances, they are in a great measure incapable; and who shall be a common judge? *We* have formerly experienced the disposition of neighboring powers, whose interests were adverse to our own, and well know the consequences;—extravagant, as we deemed them, and unjustifiable claims, on their part; animosities, factions, and even bloodshed, among ourselves.

Our vicinity to an extensive province of the British empire is a circumstance worthy of consideration. There is not an immediate prospect of war between the United States of America and Great Britain; yet, from their mutual recriminations in respect to the observance of the late treaty, and the retention of the frontier posts in the hands of the British, contrary to express stipulation, such an event, at some future day, is not improbable. Should that happen, Vermont would be in a situation much to be regretted. Our local situation with the United States, our present connection with many of their inhabitants, connected by all the ties of blood and kindred affection, would forbid an alliance with Great Britain. As allies of the United States, we should experience from the British all the resentment of an enemy whom, by our alliance, we had voluntarily made such, and to whose ravages, from our frontier situation, we must be continually exposed. And should we find in the United States that quick sense of the injuries we should suffer? Will they fly to

our defence with the same alacrity, with the same national spirit, as they would defend themselves when attacked in one of their own members? Will they equally attend to our interest as to their own in the settlement of a peace, or in adjusting the expenditures of the war? The supposition is highly chimerical; nor less so the idea that, by observing a neutral conduct, we may enjoy all the blessings of peace, while the flames of war rage on every side. Our little country would become a rendezvous and thoroughfare for the spies of both nations. Our citizens would, by both parties, in many instances, be drawn into an infamous correspondence of that kind. Every act of friendship, or even of common courtesy, done to one party, would excite the jealousy of the other. Their armies, to whom we should not be in a condition to deny a passage, would, on every the least pretext of necessity, think themselves justified in seizing our property for their support. In a word, we should be equally used, equally distressed, insulted, and plundered by both.

Again, we may take another view of the subject, as it relates to the promotion of learning and liberal science. Confined to the narrow bounds of Vermont, genius, for want of great occasions and great objects to expand the powers of the mind, will languish in obscurity. The spirit of learning, from which states and kingdoms derive more solid glory than from all heroic achievements, and by which individuals, raised above the common lot of humanity, are enabled to contribute to the happiness of millions in distant parts of the globe, will be contracted, and busy itself

only in small scenes, commensurate with the exigencies of the state, and the narrow limits of our government. In proportion as the views are more confined, more limited, and more local, the more is the mind contracted by local prejudices. But, received into the bosom of the union, we become brethren and fellow-citizens with more than three millions of people. Instead of being confined to the narrow limits of Vermont, we become citizens of an extensive empire. Here is a scene opened that will expand the social feelings; the necessity and facility of mutual intercourse will tend to eradicate local prejudices; the channels of information will become wide and far extended; the spirit of learning will be called forth by every motive of interest and laudable ambition, and exalted by the magnitude of the objects presented. Genius will soar to the heights of science. In a word, independent, we might ever continue little, and, I had almost said, contemptible; united, we become great by the reflected greatness of the empire with which we unite; our general interests will be the same as those of the union; and, represented in the national councils, our local interests will have their due weight. From the encouragement given to arts and manufactures, as an inland country, we shall reap more than a proportional advantage; and, in case of a war, an attack upon us will be felt through every member of the union. National safety, national pride, and national resentment,—not the petulance of a tribe, but great as the nation offended,—will all conspire in our defence.

These observations relate only to the expediency of joining the union in our present situation, and to the removal of such objections as may arise to the measure, antecedent to a discussion of the constitution under consideration. I shall not now enter into a minute examination of the federal constitution, but only observe upon some of its leading features, the principal end in view in its formation, and how far it is calculated to attain that end.

The great end in view, and which has heretofore been the grand desideratum in federal politics, is to bring all the states of the confederacy to act in concert, in those measures which have an immediate relation to the good of the whole. There are three principal methods by which this has been attempted :

1. The first, because the most ancient, is by a council, empowered to legislate upon the several states composing the confederacy. Of this kind were the council of the Amphictyons, at the head of the confederated states of ancient Greece. In this case, as none but states can refuse to obey, a delinquent can be nothing less than a whole state, already provided with arms and councils for a formidable opposition. To enforce the decrees of the council, which we may call the laws of the union, it is necessary to draw out the forces of the complying states, and to compel obedience by dint of arms. The history of ancient Greece, for many years, is infamous for a succession of such wars. Such was the famous Peloponnesian war, which raged with almost unabated fury near thirty years. Such ever

has been, and such ever will be, the effect of this kind of government, — if it may be called a government, — unless, like the late congress of the United States of America, they suffer their laws and ordinances to be violated with impunity. And, in this case, the consequence will be the same; the government will soon reach the lowest point of degradation, and crumble on the brink of evanescence.

2. The second mode is by a council empowered only to propose measures to the confederated states, subject to the ratification of the states severally before they can have the force of laws. The United Netherlands furnish us with an instance of this second form. The states-general are the grand council of the confederacy. This council, although pompously styled their *HIGH-MIGHTINESSES*, have, in matters of national concern, only a power to propose. The several states have reserved to themselves the right of ratification. No law can be constitutionally binding until it has received the ratification of each individual state. The veto of a single state, in some instances little superior in point of territory to the town of Bennington, may disconcert, and actually has disconcerted the wisest measures. Frequently, on great emergencies, such is the delay, before all the states can be brought to agree, that the opportunity of acting is forever lost. This has induced the states-general, aided by the stadtholder, the hereditary Prince of Orange, who administers the republic, and whose power and influence are very great, frequently to act without, and even contrary to the authority of the smaller states. Such a disregard of the constitu-

tional principles of their union, has, even among that plodding, phlegmatic people, produced violent concussions, and some within our own memory.

3. The third form is by a council, or federal legislature, empowered in all instances that concern the confederacy at large, to legislate on the citizens of the several states, and to carry their laws into execution by their own officers. Of this third form we have an instance in the present constitution of the United States of America. In this case the national legislature, in all matters that concern the general interests of the confederacy empowered, and limited by the constitution, legislate, not upon the states collectively, but upon the citizens of the union. No ratification is necessary further than their own act. The constitution, and all authoritative acts under the constitution, are the supreme law of the land. To prevent different constructions that might arise from different opinions in several independent tribunals, under the influence of local interest or prejudice, the judiciary, for all cases arising under the constitution and laws of the union hold their offices by appointment of the supreme power of the confederacy, and are amenable only to that power, and their decisions are carried into effect by ministerial officers, appointed by the same authority. While the national legislature are vested with supreme power in all matters that relate to the general welfare of the union; the states legislatures, within their several jurisdictions, retain as sovereign all those powers, the due administration of which, most endears government to mankind. To them it belongs, among their own citizens,

to regulate the mode, and to secure the acquisition of property ; to redress injuries ; to animadvert upon morals ; and to restrain and punish those crimes, which attack private property, violate personal security, and disturb the peace of society.

The senators of the United States, appointed by the several state legislatures, and from time to time amenable to them, may be considered as guardians of the rights of their respective states against all encroachments of the national government. The representatives in congress, elected by the people, and dependent on them through the means of biennial elections, are bound by all the ties of interest and affection, to watch over the rights of individuals and the rights of their several states, with which their electors are more immediately connected. The power of appointing electors for the choice of the president and vice president, gives the states legislatures a sufficient check on the executive of the federal government. It is true, this form of federal government is almost a phenomenon in the political world. Hardly a shadow of such powers, as relative to their execution, is to be found in the history of ancient or modern politics. Its novelty, however, in this age of improvement, no less in the science of politics than in other sciences, can hardly be made a serious objection ; still it is acknowledged, that however beautiful in theory, or as delineated on paper, its efficiency in point of practice might still be considered as problematical, had we not seen it evinced by actual experiment. The idea alone of the efficiency of the federal government, at the instant of its organization,

added strength to the states governments, and put an end to those turbulent commotions, which made some of them tremble for their political existence; nor has this state reaped an inconsiderable advantage from the suppression of that contagious spirit of faction which existed in some of the neighboring states. Two years have not yet elapsed since the commencement of this administration. They have already provided for funding the national debt; they have in a great measure restored public credit, which, from the weakness of the former government, they found almost in a state of desperation. They have enriched the nation with a very productive revenue. The wisdom, justice, and equality of their laws and regulations are fully evinced by a prompt and almost universal observance. In very few instances have their courts been called to animadvert upon a violation of their laws. It may be said that this arises from the confidence of the people in the present members of the government. That undoubtedly has its influence. But a people free, jealous and discerning, as the Americans are, do not suffer measures to pass unexamined. They never long give to any men, or set of men, an unmerited confidence. It is probable that the national council will long and deservedly retain the confidence of the people. The people, when called to choose rulers and legislators for an extensive empire, of which themselves are a constituent part, experience a dilation of mind; they rise above vulgar and local prejudices, and confer their suffrages on men whose abilities and integrity are equal to the task of empire.

One important consideration ought not to be omitted. The present constitution is still subject to amendments. Whatever shall be found dangerous, or impracticable, may be retrenched or corrected. That wisdom which formed it, aided and matured by experience, may carry it to a greater degree of perfection than anything that has yet been known in government.

I have, sir, in the course of these observations, hinted at the disadvantages that will accrue to us, continuing independent. I have touched upon some of the advantages of an accession to the union. I have pointed out the leading principles of the constitution, and its probable and actual efficiency in strengthening the government of the several states, and in securing the tranquillity, happiness, and prosperity of the union. The more minute investigation of the subject I leave to others. At the same time, I rest fully persuaded, that, when accurately examined with that candor and impartiality which will doubtless mark the proceedings of this convention, every material objection to the constitution, or to the accession of the State of Vermont to the union, will be easily obviated or totally disappear.

After a session of four days, the convention resolved, yeas 105, nays 2, that application be made to congress for the admission of Vermont into the federal union. And, on the 18th day of January, 1791, the legislature, in order to carry into effect the foregoing resolution, appointed Nathaniel Chipman and Lewis R. Morris to attend congress, and

negotiate for the admission of Vermont into the federal union. And, on the 4th day of March, 1791, Vermont became one of the United States of America.

CHAPTER VI.

Elected Chief Justice — Confirmation Charter under New York — Why they were not taken by the Settlers on the west Side of the Mountain — The Law in relation to those Charters settled by Judge Chipman — Appointed District Judge — Letters to General Schuyler and Governor Robinson — Sketches of the "Principles of Government" — Reports and Essays — Resigned his Office of District Judge — Appointed one of a Committee to revise the Statutes — Elected Chief Justice — His Character as a Politician.

NATHANIEL CHIPMAN had, in October, 1789, been elected Chief Justice of the Supreme Court of the State, and continued in that office until October, 1791, when he was appointed Judge of the Court of the United States for the District of Vermont.

In the administration of justice in this state, previous to the year 1791, the judges were greatly perplexed with the confirmation charters under New York. To elucidate this subject, and make it clearly understood by the reader, it is necessary to advert to the times when these confirmation charters were issued. And the reader will not be displeased, if, in order to fill a chasm in our early history, I go farther than shall appear consistent with the leading design of this work.

During the contest between the Governor of New Hampshire and the Governor of New York for the

jurisdiction of the territory now forming the State of Vermont, each claimed the right of granting the lands, and each treated the grants of the other as void. The Governor of New Hampshire first granted a great number of townships, and almost all the settlements made before the revolutionary war, on both sides of the mountain, were made under the New Hampshire title. The Governor of New York granted a portion of the same lands in the counties of Bennington and Rutland, which had been previously granted by the Governor of New Hampshire, and settled under that title. The New York grantees commenced actions of ejectment against some of the settlers, and recovered judgments against them before the courts in Albany. The settlers made a successful resistance, defending their possessions by force. And, in October, 1772, a convention was holden at Manchester, by which it was decreed that no person should take a confirmation charter under New York. In the mean time, the settlers on the east side of the mountain, generally, surrendered their New Hampshire charters to the Governor of New York, took confirmation charters, and lived quietly under the laws of New York; — two counties having been organized on Connecticut River by that government, — Cumberland at the south, and Gloucester at the north. The inhabitants of these counties, who had thus submitted to New York, were, by the inhabitants of Bennington county, considered as apostates, as base deserters of the common cause. And, when any sheriff or other officer under New York had occasion to pass from the county of Cum-

berland or Gloucester, through Bennington county, to Albany, they were obliged to travel in such manner as to escape observation; sometimes secreting themselves in the woods by day, and travelling by night.

Now, what was the cause of this very extraordinary state of things? Why did the settlers in Bennington county, so near Albany City Hall, resist the power of New York, and successfully defend their possessions under their New Hampshire charters, while the settlers on Connecticut River, having the Green Mountains between them and Albany, submitted to the government of New York, surrendered their New Hampshire charters, and took confirmation grants from the governor of that colony? If the reverse of this had taken place — if the settlers in Bennington county had submitted to New York, had surrendered their New Hampshire charters, and taken confirmation charters, and those on Connecticut River had made a successful resistance, — a bare statement of the fact would have furnished a satisfactory explanation. But, as the facts are, they require an explanation, which can be given, but not in as few words as I could wish.

The sum demanded by the Governor of New York, for a confirmation charter of a township, was seventy pounds, New York currency. At that time, specie was the only circulating medium, and that extremely scarce. During the previous French wars, and several years after, the New England colonies had issued bills of credit, or, in the language of that period, banks of paper money; and, as there was no fund provided for their redemption of the bills,

they became depreciated, and, of course, drove most of the specie out of the country. This paper money was called in, and withdrawn from circulation, a few years before the commencement of the revolutionary war, leaving the country nearly destitute of a circulating medium; by reason of which, the value of money was increased, and the prices of all species of property greatly depressed,—so much so, that, on the first of May, 1775, the average price of cows, passing at the appraisal of men, was forty shillings. This fact will enable any one to ascertain what has been the depreciation of money since that period. Yet, valuable and scarce as money then was, each individual proprietor could raise his proportion of the seventy pounds, New York currency, to obtain a confirmation charter,—it being little more than two dollars and fifty cents,—or to secure the title to a farm containing one hundred acres, less than one dollar. Although some individuals on the east side of the mountain had purchased a number of rights, yet no individual or company of individuals had purchased a number of townships. The proprietors were therefore able, in every case, to raise money to pay for a confirmation charter; and no one will deny that they were wise in doing so. To have refused the payment of a sum so trifling, compared with the value of the land, to secure an unquestionable title, would have been quite inexcusable. But why were not the settlers on the west side of the mountain equally wise? why did they spend vastly greater sums in defending themselves against the New York claimants, and put at hazard their entire

property? The answer is, it was wholly out of the power of the leading men to raise a sufficient sum of money to obtain confirmation grants of their lands.

The Onion River Company, formed some years before the commencement of the revolutionary war, for the purchasing of lands in the Onion River country, — as the north-western part of the New Hampshire Grants was then called, — consisted of Ethan Allen, Heman Allen, Levi Allen, Zimri Allen, Ira Allen, and Remember Baker. They had purchased lands in the New Hampshire Grants to the amount of about four townships; and this, it was understood at the time, had exhausted their funds. Ethan Allen was never possessed of much property. His views were elevated quite above the paltry business of acquiring it. Heman Allen commenced business as a country merchant, a few years before the revolutionary war, but never acquired much property. Levi Allen was a prodigal, and never possessed any property. Zimri and Ira Allen were young, and had never engaged in any business. Remember Baker was a mill-wright, — an energetic, enterprising man, — but could at no time have raised any considerable sum of money. It must therefore have been quite impossible for the Onion River Company to raise a sufficient sum of money to obtain confirmation charters of their lands. There was then no alternative but to rely on their New Hampshire title; and, should that fail, to defend their possessions by force; and they were heartily joined in this course by the whole body of the inhabitants

of Bennington. A great portion of them had purchased their lands of Samuel Robinson, the first settler of the town. And, as Robinson was their voucher, it belonged to him to raise money to obtain a confirmation of their title; and the large amount of the sum required must, with Robinson, have had all the weight of a most conclusive argument in favor of the New Hampshire title.

Having thus taken their stand in opposition to New York, the leaders soon infused into the great body of the settlers their own spirit, which at once raised them above all paltry calculations of pounds, shillings and pence, and enabled them to achieve the independence of the state. The state having been thus organized by those who had been long combined in opposition to the New York title, on the ground that it was void in law, and who had also rendered it more utterly void by force, it could not be expected that the New York title would be in higher favor with the courts of Vermont than the New Hampshire title had been with the courts of New York. Accordingly, the Vermont judges, viewing the confirmation charters as the wages of apostacy, adjudged them to be utterly void to every intent and purpose. This did gross injustice to the grantees under these charters. But, during the time that Nathaniel Chipman was Chief Justice, in the year 1791, he settled the law in relation to these charters in such manner as to do equal justice to all concerned. In the language of an eminent jurist, who practised before the supreme court at the time, "Judge Chipman was the first among our judges, who rose so far above the preju-

dices of the times in Vermont, against the State of New York, as to give such effect to the confirmation charters, as effectually to secure the rights of the grantees under them, consistently with the rights of the New Hampshire grantees." (See D. Chipman's Reports, p. 56.)

Ever watchful of the public interest, and ever ready to render all the aid in his power for the promotion of the general welfare, he wrote the following letters to his correspondents:—

NATHANIEL CHIPMAN TO GENERAL PHILIP SCHUYLER.

Rutland, January 25th, 1792.

SIR,—When at Philadelphia last winter, we had some conversations on the subject of opening a canal from Lake Champlain to Hudson's River. I find the subject will probably employ the attention of your state legislature, at the present session. If the following information, which I have been at some pains to collect, will be of any service in the course of that business, I flatter myself it will be a sufficient apology for my addressing you on the subject.

It will be needless to enumerate the advantages that would, in such event accrue to the people in the northern parts of the State of New York. I shall, therefore, confine myself to Vermont. From this state the trade of three counties would flow to New York through that channel—Rutland, Addison, and Chittenden. This comprehends a tract of country one hundred and twenty miles in length, north and south, and averaging in breadth, east and west, from twenty to thirty miles. The county of Rutland, with

from eighty to one hundred and twenty miles of land-carriage to Lansingburg, trades almost solely with New York. From a pretty accurate account which I have collected, there have been manufactured and exported from this county, between the first of December, 1790, and the first of December, 1791, three hundred tons of pot and pearl ashes. My accounts from the counties of Addison and Chittenden, the two northern counties on Lake Champlain, are not so accurate; but I am well assured that they exported during the same year, not less than two hundred tons. This last, from the great expense of transportation to the New York market, is mostly vended in the Province of Quebec. It is computed, that there was in these three counties, the last year, a surplus over and above the consumption of the inhabitants, of thirty thousand bushels of wheat. Yet such is the expense of transportation, that we gain very little by the surplus. The cash price has been estimated at from three shillings to three shillings and sixpence per bushel; but there is not a ready market for it at that price. The price of wheat in the Quebec market is usually very low. Those whose trade is with that province are now purchasing it at three shillings. Those who trade to New York do not, in general, consider wheat an article in which they can make remittance. Were a water communication opened, as proposed, the Quebec trade, except for lumber, would be immediately deserted, and the whole would centre in New York. The reasons are so apparent that I need not suggest them. The facility of conveyance would enable the merchant to remit many articles,

which are now worthless, by reason of the expense of transportation, and to give a higher price for all. Merchants, too, would afford their goods, especially heavy articles, at a much lower price than they can at present. The annual saving in the price of salt alone would be very great.

There are now in the county of Rutland fourteen forges, one furnace, and one slitting mill, and two furnaces in building, which will be in blast another season. There are four forges in the county of Addison, and two in the county of Chittenden. In the county of Rutland are great quantities of iron ore, and also on the west side of Lake Champlain. Vast quantities of iron, would in a few years be transported on the proposed canal.

There are, in this part of the country, numerous quarries of marble, some of them of a superior quality. Machines may be easily erected for sawing it into slabs by water, and in that state, by means of a water communication, it might become an important article of commerce.

But above all, agriculture will furnish the means of trade. The whole country, with few exceptions, will produce good wheat. The wheat grown on the marle lands about Lake Champlain, is of a quality, perhaps inferior to none raised in any part of the State of New York. Add to this, that there are few better grazing countries. Take the whole extent of this territory, there is not more than one third part of it under cultivation; but the population is rapidly increasing. The number of inhabitants in these three counties, on taking the last census, was thirty thou-

sand. Were a canal now opened, as proposed, I think, taking into view, the extent and fertility of the land on both sides of the lake, with the rapid increase of population, it will not be extravagant to suppose, that through this channel alone, New York, in less than ten years, would command the trade of one hundred thousand people. It is certainly an object worthy of public attention, and I hope it will meet with the encouragement it deserves. Be kind enough to pardon me the trouble of this letter.

And believe me to be, with great respect

And sincere regard, your obedient servant,

NATHANIEL CHIPMAN.

NATHANIEL CHIPMAN TO MOSES ROBINSON, SENATOR IN CONGRESS.

Rutland, February, 12, 1792.

DEAR SIR, — Before the réceipt of your favor of the 23d of January, I had been informed of the fate of the bill apportioning representatives, &c. Peace be to its manes. I must confess I did not at first advert to the inequality which the smaller states suffered by means of the fractional parts; but I soon found, while the ratio of Virginia was one representative to 30,000 and some odd hundreds, that of Delaware was one to 59,000; of Vermont, one to 42,550. I have seen Mr. Ames's speech on the subject; he has treated it in a masterly manner. I could not feel the force of those arguments, which went upon the convenience and inconvenience of number in the house, and a proportion between the house and the senate. The principle of the federal government is virtue. By which, I understand a sentiment of attachment to the

government and laws. This dictates a spirit of moderation; a facility in accommodating particular to general interests; reciprocally to accommodate one with the least possible injury to the other. That ratio is the most equitable, and can alone support the government without violence, which represents most equally, both in number and quantity, all those passions, sentiments and interests, that have national consequences. A legislature formed upon the principle of equal representation, will rarely violate the public sentiment, or sacrifice the national interest. Deliberation is of more consequence than the saving of a very considerable expense. In a government like this, which derives its whole energy from public sentiment, lengthy discussions on important national matters, are indispensably necessary. The people attentively peruse, and take part in the debates; they become acquainted with the several interests to be accommodated; they foresee the result, and are ready to adopt the measures of government, as soon as they are brought to a decision. I am very apprehensive that the different opinions, which at present so warmly agitate the people upon the Indian war, is owing in some measure to the secrecy with which that subject has been discussed in congress. Not that I censure the manner of proceeding; I can suppose it necessary even at the risk of this consequence. I do not suppose the whole is to be attributed to this circumstance, but, I believe, in want of that general information that would have been derived from a public discussion, the public mind is much more powerfully agitated by the two unsuccessful expeditions.

As to the justice of the war on the part of the United States, of which so much has been said, I am wholly incompetent to decide. I do not know how my opinion will agree with yours, but I think, in whatever light it may place former measures, the justice of the war in its first rise cannot be made a question in deciding what measures ought now to be pursued. Peace, certainly, ought to be our darling object. But the annals of history afford not a single instance of a peace made or maintained with savage nations flushed with victory, upon any terms of reciprocity. They will never be sincerely desirous of peace until they have felt the superiority of our arms. To act only on the defensive, could never have the desired effect. Such is the extent of our frontiers, and such it would be if contracted within any given limits that could rationally be proposed, that we can hardly conceive of an army sufficient for a complete defence, or a sum equal to the expenditures. A much less army, well appointed, and well instructed in the discipline necessary for an Indian war, would be sufficient to extirpate the whole race of Indians, from the six nations to the Mississippi, and from the Ohio to the northern lakes. God forbid such an idea should ever be realized. It is infinitely more to the honor of the United States, to the honor of humanity, to endeavor to cultivate a secure peace with that people, and to lead them by slow degrees, as they will bear it to a relish for civil improvement. It is certain, for a long time we can maintain with them only a precarious peace, and that only by being ready in arms on our part.

There will be found villains on the borders, fugitives from justice in the states, who, upon the least pique, or from motives of gain, will kill an Indian for his pack, with as little remorse as they would kill a beaver for his skin. Such, generally, are the manners and feelings of savages that they resent an injury done to an individual of a tribe, as an injury done to the whole tribe ; and an injury done by an individual of another tribe or nation, is resented against the whole tribe or nation. The impetuosity of their tempers, when inflamed by a sense of injury, renders them incapable of the delay of mutual discussion and amicable satisfaction. Indeed, this sentiment prevails not a little among those nations who think themselves highly civilized. This will be a source of hostilities not to be wholly prevented by the utmost vigilance and circumspection of government.

Everything goes on peaceably and cleverly in Vermont. The improvement of inland navigation is at present the most interesting topic of conversation. The legislature of Massachusetts have granted to Colonel Worthington and others the privilege of locking the falls on Connecticut River in that state. The legislature of New York, it seems, are determined on opening a water communication between the waters of Champlain and Hudson River. These are objects highly interesting to this state.

Believe me, with esteem,

Your most obedient servant,

NATHANIEL CHIPMAN.

In the year 1793, he published a work entitled,

"Sketches of the Principles of Government," and the same year he published a small volume, entitled, "Reports and Dissertations," containing reports of a number of cases decided while he was Chief Justice of the Supreme Court, with dissertations on the statute adopting the common law of England,¹ the statute of offsets, on negotiable notes, and on the statute of conveyances. Soon after this he became dissatisfied with the office of district judge. There was very little business in the district or circuit court, and being anxious for more active employment, he resigned his office of district judge, and returned to his practice at the bar, in which he continued until October, 1796, when he was again elected Chief Justice of the Supreme Court.

The same year, he was appointed a member of a committee to revise our code of statute laws; and it was well known, that almost all the acts known as the revised laws of 1797 were written by him; and, being in the congressional library at Washington, with the statute laws of the other states, they have attracted the attention of jurists, who have not hesitated to say, that they find no other code of statute laws written in a style so distinguished for simplicity, perspicuity, and technical accuracy.

As a politician, he was of the school of Washington and Hamilton, who established the national government against a powerful opposition from the anti-federalists. He was a prominent member of the federal party, and, because influential, the more ex-

¹ This dissertation will be found in the Appendix, No. I.

posed to have his character assailed by the opposing anti-federal party. Yet they made no specific charges against him, but confined themselves to such vague abuse as is comprised in the epithets of aristocrat, monarchist, British tory. Nathaniel Chipman an aristocrat! This must sound very oddly to those who have read his work on Government, and to all those who have witnessed his plain, republican manners, habits, and sentiments, through a long life.

The federalists did not fail to calumniate the democratic party, — the anti-federalists having, at the commencement of the French revolution, assumed the name of democrats, — but charged them indiscriminately with being anarchists and French Jacobins. How startling it would be at this day, should any one assert that James Madison, always in the front rank of conservatives, was an anarchist! Such is the course of all political parties, and such the result. Each party struggles to retain its power, or to rise into power, by depressing its opponents. And hence, as in the instances above stated, individuals frequently emerge from the clouds of calumny, in which they had been enveloped by party interest grown into party malignity, and appear directly the reverse of what they had been represented.

Neither as a politician, nor as a statesman, was the subject of this memoir one of those who are aptly termed difficult men, but was always disposed to compromise by yielding all minor points, — ever considering it to be his duty to support the best practicable measures. He seemed to be entirely free from that egotistical obstinacy, which is so inju-

rious in public, and so troublesome in private life. But, whenever any measure was proposed which he deemed a departure from settled principles, he seemed to be instinctively opposed to it; especially if he deemed it a violation of constitutional principles, or as establishing a precedent which might prove injurious to the government. In this light he viewed the proposition for the Hartford Convention. When, therefore, in October, 1814, he received information, at his residence in Tinmouth, that a proposition would be made in the legislature, then in session at Montpelier, to appoint delegates to that convention, he immediately set out for Montpelier, arrived there in season, and, by his influence, the measure was suppressed.

We have seen that he took an active part in the revolutionary war, and that, after he left the army, he became an actor in our long and doubtful struggle for independence as a state. And it appears, that his interest in the public welfare, his attachment to our free institutions, and his confidence in the successful result of our experiment in free government, were but increased by the obstacles which appeared in the way, and by his unremitting exertions to remove them. As a mother becomes more strongly attached to a helpless child, which requires all her care, than to a healthy one, which requires little attention, so our patriot fathers became more strongly attached to our free institutions, by reason of the care they were compelled to bestow upon them in their infancy, to prevent their dissolution.

As a statesman, he was practical rather than theo-

retical. He seemed to be aware that we can in everything conceive of a perfection which we can never attain. And, while he observed others, in their struggles to reach the highest *conceivable* perfection at once, go beyond what is practicable and become visionaries, he was content to take experience for his guide, and advance slowly, but steadily, to reach the utmost *attainable* perfection. His mind was eminently logical, but his reasoning was principally by analogy and induction. This gave his mind a wider range, rendered it more discriminating, and gave it a more practical cast.¹

¹ The reader will find in the Appendix, No. VIII., a statement of some of Judge Chipman's political opinions, in a letter to Alexander Hamilton, occasioned by certain proceedings of the Democratic Society of the county of Chittenden.

CHAPTER VII.

Elected Senator — His Speech in the Senate on a Resolution concerning a breach of its Privileges — Letter expressing his Views of the French Revolution — His Speech on the Judiciary Act.

IN October, 1797, he was elected a senator in congress for six years from the 4th of March, 1798. In that body he was distinguished for his talents, his learning and his independence. On the 19th of March he delivered the following speech in the senate, on a resolution to bring the editor of the *Aurora* before the senate, to answer for a breach of the privileges of that body, in publishing certain virulent paragraphs respecting its proceedings in certain matters then under the consideration of the senate.

MR. PRESIDENT, — The honorable gentleman¹ last up has dwelt on an objection, which has been frequently urged with peculiar emphasis in the course of this debate, “that if the senate take upon themselves to vindicate the privileges of their body, they must of necessity be their own judges; that this is unfitting, that it is against natural justice, and ought never to be admitted.”

But the position is not founded in truth. Whenever the right of self-defence, of self-protection, ex-

¹ Mr. Marshall, of Kentucky.

ists in any individual, or society of individuals, the right of judging each in his own cause equally exists. It is admitted from necessity in certain instances. It is in those instances strictly natural, and comports with natural justice. It is, indeed, the great business of government to diminish this necessity to individuals of exercising this right, by a provision of laws and tribunals, to which all may resort for a redress of injuries. But no provision can extend to all cases. The right of self-defence, of self-protection, is, and ever must, on certain occasions, be left to the individual. It is left to the nation, and to certain purposes, as I shall hereafter endeavor to prove, is vested in the higher and more independent departments of the government. The right of judging is in any man or body of men coexistent and precisely coextensive with the right of self-defence or self-protection. Of what avail would be the right of self-defence, unaccompanied by the right to judge of the means and measures of the defence necessary? Is a person whose life is threatened with an instant attack, coolly to refer his case to some tribunal to decide whether the occasion will justify a defence, and to what precise extent? No, sir, the laws of nature do not thus defeat its rights. Those laws have inseparably connected the right of judging with the right of self-defence; the latter cannot exist even in theory without the former. The individual is still under the correction of the law, to which he is amenable for the exercise of this and every other personal right. Public bodies are under the restraint of character and public opinion; and these will, on all occasions, be a

sufficient security for the use of a sound discretion in the exercise of the right.

Sir, in recurring to the resolution before us, I perceive that in this discussion are involved principles of great importance and extensive influence. For, though at this time we apply them to a single part only, yet either directly or in their consequences, they affect all the great principles of our government. They are, perhaps, involved in some degree of obscurity; but, I believe, the obscurity arises rather from the novelty of a discussion of these principles, than from anything in the nature itself of the principles. Satisfied with a practice which has been handed down to us from time immemorial, the principles in which the practice was founded have been suffered to remain unexplored, and to become obscured through the rust of neglect. It is necessary to draw them from that rust, and carefully examine them on this occasion.

If, sir, the privileges which are asserted in the resolution are not constitutionally vested in this senate, we ought to reject it, as leading to an unwarrantable assumption of power. But, sir, if certain rights are established by the constitution, and committed to the senate in trust, for the protection of the body, and to enable it in conjunction with the other branches of the government calmly and securely to pursue the great end of its institution, the happiness and prosperity of the community, can we neglect to assert those privileges, and vindicate those rights, if at any time we shall see them grossly violated? If we should neglect, from a supine inattention, we should

be chargeable with unfaithfulness to our trust. If, clothed with competent authority, as I conceive we are, we neglect through fear, we are chargeable with weakness. If, from partial considerations or sinister motives, we refuse, we are justly chargeable with criminality.

It is said, sir, that the constitution of the United States, by which alone all the powers of this government are instituted, has vested in the senate no privileges, in the parliamentary sense of that term, exclusive of the privilege of the individual members. All, however, have not gone so far.

Let us carefully investigate this important subject. Let us inquire,

1. Whether any privileges are, by the constitution, vested in this senate, extending to the whole body?

And 2. If any such are vested, whether we are prohibited by any express clause in the constitution, or any necessary construction, to claim or assert them?

Sir, it is said that there is in the constitution no grant of privileges to congress, or to either house of congress, in express words, and this may without difficulty be admitted. But first let it be observed, that the words "granted" and "delegated" are not in the constitution used in the appropriate sense of those words, but as equivalent to the word "instituted." The people of the United States, with the assent of the states governments, which had been already established, instituted the national government and its several powers, but did not *grant* or *delegate* either. Did the people grant or delegate the power to them-

selves? This would be an absurdity. Or to the state governments? This will not be contended. Or to the administrators of the national government? Certainly not. The national government and its powers were, by the constitution, instituted for the general good, and in the same instrument a provision is instituted for designating the several agents, who shall be the administrators of the powers of that government. They are not grantees or delegates of those powers; they are merely agents of the nation, constitutionally designated for the exercise of those powers. In speaking of the agents, there is no particular impropriety in saying that *they* are delegated to the exercise of the instituted powers of government.

After premising these observations, I again say, we may safely admit, that there is in the constitution no grant, delegation or institution of privileges to congress, or to either house of congress in express words. And yet, sir, I have no possible hesitation in saying, that it is clearly demonstrable that both branches of the national legislature are fully invested with these privileges.

1st. From the institution itself, its nature and necessary results.

2d. From the certain, and, I may say, unavoidable intention, in framing the constitution.

Sir, the federal constitution is, in its nature and design, a political institution, calculated to concentrate the views and interests of all within the limits of its operation to one great national point; to bind the states in a national union; and to give to the whole, if the expression be allowable, a national indi-

viduality. And, if this constitution be not an anomaly, a heteroclite in kind, it has its necessary and inseparable incidents, relations, and constructions. Moral and social rights and duties result from moral and social relations. Such relations necessarily, nay, I may say, naturally exist in every community, varied indeed, and modified, by the state of society and by civil institutions. In these relations are found the principles of common justice, exclusive of positive institutions, as they are applied to social rights and duties in each community. These are the principles of common right, or, more intelligibly expressed, of common law, in every nation. This is the true and genuine source of these principles, whether in England, in France, or in the United States.

When, sir, in forming a government, various parts are instituted and organized into a whole, completing a constitution, the institution of the various parts, thus organized, is an institution of all the necessary relations thence arising, and of all the rights, duties, and powers resulting from these relations. It is true that these rights, duties, and powers may, in their observance and exercise, be limited and modified by express provisions in the institution; but, if not so limited and modified, they are, in their nature, co-extensive with the subject, scope, and end of the institution itself. And is there, sir, anything in the constitution of the United States, — in its origin, in the manner of instituting its powers, or in the subjects of its operations, — which so far changes its nature, that no relations are incident to it? That no principles of rights and duties are to be found in its

results? Or are its incidents, its relations, barren of all result, — affording no ground for genuine construction? No, sir; it has its relations, necessary and inseparable from its organization, and from those relations certain rights and duties necessarily result. Nor can it be doubted that, organized as this government is, it is invested with power competent to protect and enforce, in every branch, all its constitutional rights and duties. One of these rights is the right of self-protection. It is a right natural to, and inherent in, every sensitive being; from the lion that prowls in the deserts of Lybia, to the ephemeral insect that floats on the breeze of summer, — not more in nations and communities instituted by man, than in the gregarious association of brute animals and insects. The community of the beaver, of the bee and the ant, — to all, this right is the sacred institution of nature. It will not be denied that it exists in every nation, against foreign aggression as well as against domestic violence. In the individuals of a nation it exists, and is permitted in cases of immediate and urgent necessity, under the guaranty and restraint of law. In subordinate communities, as in corporations, it also exists, under the same guaranty and restraint of law; for corporations are considered but as individuals, as artificial persons, and are, like other individuals, under the ordinary control and protection of law. It is different with the nation, — it is different with the several branches of the government, — as they are placed in a state of greater independence as they rise higher in the community. Not to instance in the lower grades

of the judiciary magistracy, such is the situation of a court of law, — in many respects an independent branch of the government, — that, although the administrator of the laws, it cannot, as a court, be under the protection or control of the law in the ordinary mode. It cannot be consistent with its situation, by its personal prowess, to repel insults and repress disturbances. Hence it is vested with the right, the power to punish contempts, — a power commensurate with the end, a due and orderly administration of justice, — a power, though not expressed, always understood, and acknowledged to be inseparably incident to the institution. This right and power in the courts of law to punish contempts, is, in each branch of the legislature, the privilege of the body, and the right to punish a breach of these privileges.

Placed in the most eminent station in the community, each branch of the legislature stands on still higher ground than a court of law. Not being, as a body, under the protection or control of the law in the ordinary mode, and more independent, they have no coördinate or superior power to which they may apply, to protect them against insults, against perpetual disturbances and interruptions. There is, therefore, vested in each branch of the legislature, this right and power of self-protection, — a right and power to punish a breach of its privileges; and, from the relations of the legislature in the community, and the important ends of their institution, the right and power are in this respect more full, more extensive, and more independent, than in any other department of the government.

It will be observed, that, in this government, the executive magistrate is under the control as well as the protection of the ordinary laws, and, in the discharge of his functions, in a situation different from that of the legislature or judiciary branches, can neither need nor obtain the exercise of this power.

Then, sir, the privileges of this senate derive their origin from the constitution of the government, from the nature and necessary result of the institution.

An equally strong, if not stronger, ground of argument, is to be found in the necessary and unavoidable intention in the formation of the constitution. In discussing this topic, sir, it will be necessary to inquire what were the habits of thinking, what were the opinions which have universally prevailed in this country, in civil life and on civil institutions, from its first colonization down to the time of forming and adopting the present constitution of the United States,—habits and opinions which must have influenced every deliberation, and blended with every result in that important transaction. It will be necessary, likewise, to examine the constitution, and to see whether, in all its expressions and allusions, it does not clearly evince the predominance of such habits and opinions.

The common law of England was, and is, the common law of the several states. The people, from the first colonization in the country, claimed the common law as their birthright, and its rights and privileges as their unalienable inheritance. For such, sir, was ever the strong language of their claim. To repel encroachments on these rights and

privileges, they drew the sword against the country from which they were descended, and by the revolution, at an immense expense of blood and treasure, secured the enjoyment to themselves, independent of the parent state.

There were, however, admitted, in this country, some necessary exceptions, some necessary variations from the common law of England. From the different situations of the two countries, and the difference of the governments, the subjects of the law were not always the same. The relations arising from the monarchical constitution of the executive, and the hereditary branch of the legislature, in England, did not exist in this country. The doctrines, therefore, peculiarly applicable to those subjects, could not exist here in practice, — certainly not since the revolution. The same observations will apply to religious and other national establishments, which have either not been adopted, or have been discontinued in the states.

The different land tenures in many of the states, excluded in practice many doctrines of the common law of England, there being no subject to which they could apply. Subjects and relations may have existed here, which did not exist in that country. Judicial decisions on these subjects, founded in the principles already mentioned, may have made an addition to our common law. Statutes of the different states adapted to local circumstances and occurrences, in many instances produced considerable variations from the common law of England, and that in different degrees.

With these variations, the doctrines of the common law which, from the country of its origin, and vast improvement as a science, we call the common law of England, were indissolubly blended with all the thoughts, opinions and actions of the people of these states, in civil and social life. This common law and its principles, they had constantly in view in all their regulations, establishments and institutions. These principles, long established in practice, they knew, they considered them, (where no deviation was expressed, or intention of deviation apparent,) as directing the operations and limiting the extent of all their civil institutions. A constant recurrence to these known principles, served them on such occasions instead of volumes.

Such, sir, were the habits, and such the opinions of those illustrious characters, who, in the grand convention of these states, framed and proposed the federal constitution, and of the people by whom this constitution was adopted. Thus circumstanced, is it to be supposed that the members of that convention and the people of these states tacitly excluded all reference to the common law, its rules and reasons, in the establishment of this institution, and all its various provisions? and that, too, when employed in subjects, the common law doctrines and principles of which were as familiar to them as their ordinary thoughts; nay, which formed an essential part of all their civil and political institutions? The supposition is absurd — the thing is wholly incredible. Nay sir, to any powers of mind so formed, it was utterly impossible.

Again, sir, let us resort to the instrument itself, to the expressions and allusions in the constitution. We find there mention of suits at common law, and in some instances, an observance of the rules of the common law, expressly enjoined with a view of limiting in such instances, the legislative power of congress. A judicial power is instituted, and the objects of its jurisdiction generally ascertained; but what questions are of judicial cognizance, must be learned from the common law, or must remain unknown. To that law we must resort for the knowledge of a jury, and of a trial by jury; for the definition of an impeachment, and for the manner of proceeding on an impeachment; for a definition of bribery, perjury, felony, and many other terms there used in the technical sense of the common law. Even for a knowledge of the legislative power of congress we must resort to the same source — the doctrines of the common law. It is true, the constitution has in particular or general terms limited the legislative power of congress to certain subjects, but the power itself on those subjects it has nowhere defined. It is nowhere in that instrument said, that the legislature has always the power of repealing, altering, and modifying its former laws; that its power is uncontrollable within its constitutional limits. From a knowledge, however, of the common law principles and practice on this subject, these things are perfectly familiar. But, sir, it is unnecessary to multiply observations on the common law principles embraced in the constitution. Proofs to our purpose will be found in every article, in every section; even in those which were intro-

duced for the purpose of altering the common law in particular instances, forming exceptions to the general rule.

The privileges of the legislative body were not in this country a mere theory of the common law of England, or of the law of nature. It is a doctrine which was known, acknowledged and adopted in practice in every colony before the revolution, and since that period has justly been considered essential to the functions of every independent legislature. Some of the states constitutions, from abundant caution, have expressly recognized this power, while others have been silent on the subject. But the legislatures of all the states have exercised the powers whenever occasion demanded it. If there may now be found a singular instance or two of a dereliction of the right, or of the exercise of the power, that cannot bear down the immense weight of authority on the other side.

I conclude, therefore, that those rights which we have denominated privileges, and the power of punishing for a violation, the right and power of self-protection, are, from the nature of the institution, and the clear, undeniable intention in the formation of the constitution, vested in the fullest sense in this senate. But we are told, that incidents and results otherwise necessary may be limited and excluded by express stipulation, and that thus it is in the constitution of the United States. The 10th article of the amendments to the constitution is in these words: "The powers not delegated to the United States by the constitution, nor prohibited by it to the people,

are reserved to the states and the people respectively." This article, it is said, cuts off every source of construction relative to power. That although certain rights and duties may result from certain relations established in the constitution, yet the arm of power raised to enforce these rights or duties in any instance not specified in the words of the instrument, is at once paralyzed by the magic of this formidable article.

But let us fairly examine it. It is not said "the powers specified in terms" or "the powers not expressed and defined," but, "the powers not delegated," or to express the precise meaning in the true constitutional sense. The powers not instituted "are reserved." And surely, sir, the powers instituted in the constitution, are *delegated* in any sense in which the word is there used. Sir, in answer to this objection, permit me to repeat a former observation: "When, in forming a government, various parts are formed and organized into a whole, completing a constitution, the institution of the various parts thus organized is an institution of all the necessary relations thence arising, and of all the rights, duties and powers resulting from those relations." Nay, sir, these results, the rights, duties and powers, are the real end of the constitution; the organization is but the means of effecting that end — stripped of its results, what remains of the constitution? An organized body without a mind — a skeleton without life, without efficiency. Does, then, this article annul, does it limit any one right, duty, or power fairly delegated or instituted in the constitution? Does it in any

sense vary the original, genuine construction? It certainly does not. It is mere surplusage; or, to say the least, was admitted from abundant caution.

Still, sir, another objection is urged from the same source. In the first article of the amendments, it is said, "Congress shall make no law respecting an establishment of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The meaning of this article, it is insisted, is, that congress shall have, on no pretence, the right or power to restrain, or in any way to animadvert on the publishing in speech or in print, of the most outrageous abuse, the most violent threats against the government. Nay, the most pressing invitations, the most public and daring exhortations to immediate insurrection and rebellion. Congress are not, as in the same article relative to an establishment of religion, prohibited to make any law on the subject of speech, or of the press; but to make any law abridging the freedom of either. If we suppose this prohibition to extend equally to the case now before us, as to that of passing a law, still it opposes no objection. True freedom or liberty is inseparable from the just and the right. True freedom is always governed and limited by this ancient and expressive maxim, "So use your own that you injure not the right of another." It is too monstrously absurd to maintain, that to guaranty to any one the liberty or freedom of action, is to guaranty to him a right to do wrong — to commit crimes with impunity. Yet this is precisely the whole force of the objection.

Still, it is urged, that, although it may be admitted that the senate have certain privileges, and a power to punish a breach of those privileges, yet no publication, in speech or in print, respecting the senate and their proceedings, however false, however slanderous, however rancorous, can amount to a breach of privilege. If it be conceded as a natural right, and from the necessity of the case, that the senate shall have the power to punish, as a breach of its privileges, a direct attack upon them in session, — an insolent disturbance of their deliberations, — yet it can extend to nothing out of their presence.

This, I think, however, will, on a bare examination of the cases which have occurred, and may occur, be found not to be just. The ground is much too narrow. The end for which these privileges were instituted is, to protect and secure the senate against all those violent proceedings from without, which directly, or by immediate consequence, tend to outrage their persons, interrupt their deliberations, overawe their proceedings, or to corrupt their integrity. Suppose some one should, out of the house, make a personal attack on a member, to prevent his attendance on his duty in the senate; or should threaten to assassinate a member, if he did not vote in a certain manner on some question depending; or suppose a number of persons assembled at a little distance, out of the hearing of the senate in their seats, should constantly utter the most outrageous threats, with a view that information might reach and overawe the members; were they to publish these threats, in handbills stuck upon the walls of the

senate-house, or in a newspaper printed and daily circulated in the place of their session ; — would not all these be equally breaches of the privileges of this house ? Or is a threat less so because it is deliberately reduced to writing or published in print ? Certainly not. An attempt to bribe a member, although done out of the house, is clearly a breach of the privileges of the house. It was solemnly so decided by the house of representatives. Another case, I am clearly of opinion, is the one before us. Is not a false and scandalous publication, made and circulated in the place of their session, maliciously misrepresenting the motives and proceedings of the senate and its organs, — reducing them, if without all power of redress, to sit and deliberate under the constant apprehension of the public contempt, the public indignation, injuriously excited against them on the very subject of their deliberation, — a high-handed and daring breach of the privileges of the body ? Is it not an attempt, has it not a direct tendency, to overawe their proceedings ? Or does it vary the nature of the attempt, that the members of this body have firmness enough to resist the impulse ? Certainly, sir, if any case can occur which may be deemed a breach of the privileges of this house, this is one. If any which can call for an exercise of its powers, this is eminently one. I therefore think it my duty heartily to concur in the resolution.

The following letter will show the views which he entertained of the French revolution while it was in progress, and subsequent events have shown how far these views were correct :

Philadelphia, February 28th, 1800.

DEAR SIR, — The mail arrived so late last week, that I had not time to call on Mr. Wollcot; I will see him, and write to you the result by the next mail.

It is difficult to say what will be the effect of the late revolution in France, — what will be the next revolution, and the next; and whether it will end in the restoration of monarchy to the ancient line under some modifications, or whether ambitious tyrants, under the title of Directors or Consuls, according to the caprice of the moment, will continue to exercise over the people of that country the most severe military despotism for years to come, cannot be foreseen. I do not believe that the policy of France will be materially changed under the present regimen. We may expect to find the same faithless spirit of intrigue, the same restless ambition, pursuing its object, *per fas et nefas*, by open war or treacherous peace, as either shall appear at the time most conducive to the end they have in view. It is not easy to foresee what will be the final effect of all this upon the people of this country. With one part of the community, it seems to be a link in the chain which leads them on to a love of tyranny and military despotism, and to forget, if not to hate and despise, the rational liberty which is secured to all in this country, by the mild energies of our own government. The infatuation is unaccountable; — the warmest zeal for liberty, with the most enthusiastic adoration of tyranny.

The late revolution in France will probably retard the business of our envoys; their credentials were to

the Directory, which is not now in existence. They wait for the arrival of other credentials to the Consuls; perhaps it will be best to send a number in blank, to be filled up, as occasion shall require, with the style of the executive authority for the time being.

I am, dear sir,

Your sincere friend,

NATHANIEL CHIPMAN.

By the first judiciary act organizing the courts of the United States, passed in September, 1789, two courts, denominated circuit courts, were to be holden annually in each judicial district, by any two justices of the supreme court and the judge of the district. The attendance of two justices of the supreme court at each circuit court in the respective districts, beside two sessions of the supreme court holden annually by all the justices at the seat of government, required of the judges such burdensome services, that they at length addressed the following letter on the subject to President Washington :

SIR, — Your official connection with the legislature, and the consideration that application from us to them cannot be made in any manner so respectful to government as through the President, induce us to request your attention to the inclosed representation, and that you will be pleased to lay it before the congress.

We really, sir, find the burdens laid upon us so excessive, that we cannot forbear representing them in strong and explicit terms.

On extraordinary occasions, we shall always be ready, as good citizens, to make extraordinary exertions. But, while our country enjoys prosperity, and nothing occurs to require or justify such severities, we cannot reconcile ourselves to the idea of existing in exile from our families, and of being subject to a kind of life on which we cannot reflect without experiencing sensations and emotions more easy to conceive than proper for us to express.

With the most perfect respect, esteem, and attachment, we have the honor to be, sir,

Your most obedient and most humble servants,

(Signed)

JOHN JAY,
WILLIAM CUSHING,
JAMES WILLSON,
JOHN BLAIR,
JAMES IREDELL,
THOMAS JOHNSON.

¹The President of the United States.

The President communicated this letter to congress on the seventh of November, 1792. And it was undoubtedly in consequence of this communication that the judiciary act was revised at the same session. An act was passed authorizing one justice of the supreme court, with the district judge, to hold a circuit court. In case of their being divided in opinion on the final hearing of a cause, or on a plea to the jurisdiction, the cause to be continued to the succeeding term, when another justice might attend. This arrangement afforded some relief to the judges of the supreme court, but was found to produce serious in-

convenience to the suitors. To remove these inconveniences, and to improve the judicial system, congress passed an act on the 13th of February, 1801, entitled an act for the more convenient organization of the courts of the United States. By this act, six circuits were established; five for the Atlantic states, and a sixth for Kentucky, Tennessee, and the district of Ohio. To each of the five first circuits, three circuit judges were assigned, and an annual salary of two thousand dollars was allowed to each judge. In the sixth circuit, the judicial duties were to be performed by a circuit judge, with the assistance of the district judges of Kentucky and Tennessee. After the circuit judges had been appointed and commissioned, and after they had entered upon the performance of their judicial duties, according to the provisions of the act constituting the circuit courts, in the senate of the United States, on the sixth day of January, 1802, Mr. Breckenridge, a senator from Kentucky, introduced the following resolution :

Resolved, That the act of congress, passed on the 13th of February, 1801, entitled, an act for the more convenient organization of the courts of the United States, ought to be repealed.

In opposition to this resolution, Nathaniel Chipman delivered the following speech :

MR. PRESIDENT, — After the length of time which has already been consumed, and the abilities which have been displayed in this debate, I can have but little hope of exhibiting anything new for the consideration of the senate. Yet, momentous as I con-

sider the decision to be made on the present question, involving consequences powerfully affecting the most important principles of the constitution, I cannot persuade myself to give a mere silent vote on the occasion. In the observations which I intend to make, I shall endeavor, briefly, to examine some of the principal arguments only, which have been offered in favor of the resolution on your table.

The arguments, in support of the resolution, have been reduced under two general heads.

1. The expediency of repealing the law contemplated in the resolution, and

2. The constitutional power of congress to repeal that law.

To evince the expediency of the measure it has been said, that the system of 1793 was adequate to all the purposes of the national judiciary; and that the judges, appointed under that system, were competent to all the judicial duties required. Upon this, sir, I shall briefly observe, that from the number of terms of the supreme and circuit courts, and the immense distance to be travelled, the labor was unreasonably great. From the labors and fatigues of riding the circuit, there could not be allowed time sufficient for those studies, and for that calm and deliberate attention, which is so necessary to the proper discharge of the duties of a judge.

At times it has happened, that a supreme judge could not attend a circuit court; from this circumstance the court in the district to which I have the honor to belong, has more than once failed to be holden. At other times the arrival of the judges has

been so late, that the proper business of the term could not be completed. These failures occasioned very great delay, expense, and vexation to the suitors; and we know that the same, or greater failures and delays, have unhappily been experienced in other parts of the United States; failures and delays which I cannot attribute to any criminal negligence of the judges, but to the burthensome duties imposed by that system, and the infirmities and accidents to which men must ever be exposed, in the performance of labors so arduous and extensive.

To prove that judges of the supreme court must have been competent to all the duties of that and the circuit courts, the honorable gentleman who introduced the resolution, drew a comparison from the courts and judges in England. He has told us that in England there are but twelve judges, and three principal courts; that these courts embrace, in their original or appellate jurisdiction, almost the whole circle of human concerns; that the two courts of king's bench and common pleas, consisting each of four judges, entertain all the common law suits of forty shillings and upwards, arising among nine millions of the most commercial people in the world; and that they have, moreover, the revision of the proceedings of the subordinate courts in the kingdom, down to the courts of piepoudre; and that from long experience these courts have been found fully competent to all the business of the kingdom. This statement, sir, is by no means correct. In England the house of lords is the supreme court of appeals in the last resort, in cases both at law and in equity. Instead of three

there are four superior courts. The court of chancery, in which are decided all suits and matters in equity, including a very numerous and important class of causes. The courts of king's bench, common pleas, and exchequer, all of which have original jurisdiction in civil causes; and the king's bench, besides being the highest court of criminal jurisdiction, has also the correction and revision of the proceedings of all the subordinate courts, by writ of error or otherwise. The subordinate courts, which were barely mentioned, are very numerous. There are, in England, exclusive of Wales, more than forty counties, all of which have their separate courts and judges. Some of the counties are regular franchises. Lancaster, Chester and Durham, have their separate courts, both of law and equity, which claim cognizance of causes and parties, within their respective jurisdictions, even against the courts at Westminster. There are also an immense number of cities and towns corporate throughout the kingdom, the courts and judges of which, though more or less limited in their jurisdiction, entertain a vast variety of civil suits. There are, besides these, the high court of admiralty, which has an exclusive jurisdiction in maritime causes; the courts of the two universities, the prerogative court of the Archbishop of Canterbury, the archiepiscopal court of York, the diocesan and other ecclesiastical courts, having also an extensive jurisdiction, of a civil nature, in causes testamentary, and those relating to the distribution of the goods of intestates.

Wales is a principality, and its courts have exclusive original jurisdiction within the territory. The

great sessions is the highest court of the principality, from which a writ of error lies in the court of king's bench. The subordinate courts and judges are equally numerous, in proportion to the territory and inhabitants, with that of England. I omit the courts of conscience and other inferior courts, and magistrates almost without number. From this view, though imperfect, it is evident that the comparison attempted by the honorable gentleman, is by no means favorable to his conclusion. The population of that country exceeds that of the United States by one third, perhaps more; but its whole extent, exclusive of Wales, though not comprehended in the *nisi prius* circuits, does not equal one of the circuits of the United States, under the system of 1793; and yet that country employs, it is believed, more courts and judges, not only than the government of the United States, but than all the individual states taken in addition. I do not, however, conceive that any advantage is to be derived from the comparison, to the one side or the other. The situation of property and civil policy, numerous and complicated rights, introduced by ancient usages, and supported by laws and habits, and by interests public and private, may render a greater number of courts and judges, a more extensive judicial system, necessary in one country than in another; I think it ought to be laid wholly out of the question.

It has been said, that a knowledge of the local laws, of the customs and manners of the several states, is necessary to the judges of the supreme courts, and cannot be dispensed with on appeals in

causes arising in different parts of the union, and that the judges can acquire this knowledge in no way but by attending the circuit courts in the United States. But let me observe, sir, that the laws of the several states, which vary from the common law, are to be found in their statute books, in the decisions of their courts and their rules of practice; for no custom can as such become a law until it shall have been adopted by usages and established by judicial decisions. All these may be made to appear on an appeal, either on the face of the record in the pleadings, or in a special verdict, or by proper exemplification, and will afford the court in such case a more correct knowledge than the recollection of a judge of what he has caught in the hurry and fatigue of a circuit.

A further objection has been urged against the continuance of the present judicial system, from the additional number of judges which it has introduced, which it is said may prove dangerous to the liberties of the country. An honorable gentleman from Georgia, (Mr. Jackson,) cited the opinion of an author who has written on the British constitution, that the greatest political evil which could befall a country, was the existence of large judiciary bodies, and who had illustrated his ideas on the subject by instancing the parliaments of France. The observation does not, neither was it meant by the author to apply to any particular number of courts in due subordination, each consisting of a small and limited number of judges, and employed solely in proper judicial business. But it applies with force to courts composed

of numerous members and forming large bodies, who, in addition to their proper judicial functions, are permitted to assume an authority in the political concerns of the nation.

Such were the parliaments of France, the late judicial courts of that country; particularly the parliament of Paris. The members of this body were very numerous, and as it was necessary that all royal edicts, before they were to be considered as laws, should be registered in that court; they claimed the right of deliberating and deciding on the registration of any edict offered by royal authority, and consequently of permitting or refusing it the sanction of a law. With this claim that body certainly became dangerous to the existing government, and the contest which ensued between them and the king on this subject, had no doubt a powerful effect in precipitating the late revolution in that country.

But there is nothing in all this which can be applied to the courts of the United States. Let me observe, sir, that there has always appeared to me in the system of 1793, which is sought to be restored, a very great and manifest impropriety. The circuit courts were in that system, though subordinate, in some measure blended with the supreme court, one or more of the judges of the supreme court being always judges of the circuit courts. This rendered the supreme court a fluctuating body, some of the judges of the supreme court being always excluded in the decision of causes coming by appeal from the different parts of the United States. And when two supreme judges held the circuit courts of the four re-

maining judges, who were to decide on an appeal, three might reverse a judgment against the opinion of the fourth, and the opinion of the two judges in the circuit court, unless those judges, from whose judgment the appeal was made, gave also their opinions in favor of an affirmance, and which they might do, their exclusion being indeed only voluntary from a high and just sense of propriety. This has always appeared to me, to say no more, a very glaring impropriety in that system. The circuit courts under that system have indeed been compared to the *nisi prius* courts in England, but the slightest attention will convince any one that they do not compare. The circuit courts in our system are courts of original and distinct jurisdiction. Not so the courts of *nisi prius* in England; they are considered as a branch of the superior courts, at Westminster, and are held by a commission of assize usually issued to a judge of one of the superior courts, and an associate for each of the six circuits into which England is for that purpose divided. When a cause in any of the superior courts is by the pleadings put on an issue of fact, it is with the record sent to be tried at *nisi prius* by a jury of the proper county; instead of calling up a jury to try it at the bar in Westminster Hall. After the trial at *nisi prius*, the verdict with the record is remitted to the court, out of which it was sent, and there the opinions of the *nisi prius* judge, and the conduct of the jury are examined, and considered as matters passing in the same court. Here, then, the comparison wholly fails; there is no similarity between the two systems, except that of a judge riding the circuit.

Here, sir, I shall waive any further observations on this part of the subject, and come to the great question which it is necessary to decide. Have congress the constitutional power to repeal the law as contemplated by the honorable mover of this resolution? To abolish the courts established by that law, put down the judges and abolish their salaries? It is true, as was observed by the honorable gentleman from Georgia, (Mr. Baldwin,) that the resolution does not necessarily involve that question, because the repealing act, if the resolution should be adopted, may be so modified as to avoid any difficulty relative to the salary of the judges. But as the honorable mover avowed his intention to be an abolition of the courts, the offices of the judges, and their salaries, and as the principal arguments have, in the course of this debate, been directed by that view of the subject, I shall be permitted to consider it on that ground.

One source of argument in favor of the measure proposed, has been derived from the powers considered as incident to every legislative body. It is said, that a power to repeal all its legislative acts is inseparably incident to every sovereign legislature; that the act, the repeal of which is contemplated, is a legislative act of congress, therefore congress necessarily have the power to repeal it; that to admit the contrary, is to say that the power of congress at one time, is not equal to its power at another time; that a subsequent congress may be bound by the acts of a former, contrary to a very important maxim in legislation; in a word, that it is to make the creature greater than the creator, as it denies to congress the

power over its own acts which it has passed, and will, of course, put a stop to all amendments, all improvements of our laws. The doctrine here meant to be asserted is not in the full extent applicable to the legislative powers under our constitution. There are acts which congress are by that instrument expressly denied the power of passing; there are acts which, whenever passed, congress cannot repeal, or rather the effects of which they cannot suspend, much less can they destroy. They are expressly denied the power of passing *ex post facto* laws; and this applies no less forcibly to a repealing act than to any other act—it is by its operation that the nature of the act is in this case determined. Every act, which in its operation attempts to divest any right previously acquired, whether by a former act of legislation, or by any other lawful means of acquisition, is in name, nature and essence, *ex post facto*. Indeed, sir, I apprehend that some gentlemen have been led into a mistake on this subject by an incautious admission of maxims and theories of legislative powers, in another government, but which do not apply to our government, as instituted and limited by our constitution. There are, sir, in every nation, two kinds of legislative powers. The one is original and extraordinary, and may be called the power of political legislation. It is by an associating nation employed in forming and organizing the government, in disposing its powers, and defining or limiting their exercise. The other is derivative; the ordinary power of legislation, and is employed in the civil regulations of the community. In the first consists the political sove-

reignty of the nation. This power is transcendent. It is paramount to all other powers in the nation. It can create powers, rights, and duties, and can abolish them at pleasure ; not because what it does is always wise or even just, but because no other power in the nation can have a right, or can be equal to control its operations. In Great Britain, from ancient usage, the consent of the nation, witnessed by long and general acquiescence, both the ordinary and extraordinary powers of legislation are considered to be vested in the parliament of the nation. Acting in this capacity of political sovereign of the nation, the British parliament can create rights, and can destroy existing rights at will ; although in exercising such acts of power, they proceed with great caution, and are careful to indemnify individuals, whose rights they may have injured. In this capacity it can, as it has done, new model the government. It can fix and alter the duration of parliaments, and change and limit the descent of the crown. Indeed, vested with this power, in addition to the ordinary powers of legislation, the figure is hardly too bold, by which, when acting on subjects within its authority, it is said to be omnipotent. Not so the congress of the United States. They possess not that transcendent power, that uncontrollable sovereignty of the nation ; they possess the ordinary powers only of legislation, and these powers they derive under the constitution of the United States. By this instrument their powers are instituted, limited, and defined. This instrument is the act of the political sovereign, the people of the United States. To them it was proposed, and they

through their agents empowered for that purpose, enacted it the fundamental and supreme law of the national government.

They have said, as they have a right to say on this subject, congress shall act; or that they may act at their discretion. Here the congressional power is limited; there is placed a barrier which shall not be passed. Congress, as I observed, possess not this paramount power; but in one mode provided for altering and amending the constitution, they are under certain restrictions, permitted an inceptive power. They have a right to originate proposals of amendments, which, when ratified by three fourths of the state legislatures, to whom the national sovereignty is, in this instance, referred, are adopted into, and become a part of that instrument. In another mode the state legislatures have the power of inceptions. They also may originate proposals of amendments, which congress must refer to a convention of the people for their ultimate acceptance and ratification. In this instance alone have the people of this country reserved to themselves a portion of the national sovereignty, in the exercise of which only is found that voice of the people, which, because it is not to be resisted, is sometimes called the voice of God. This, sir, is the authority of the supreme law under which we act, the constitution of the United States, an authority indispensably binding. We have no right, when we wish to carry a favorite measure, to which we find some barrier opposed by the constitution, to prostrate or overleap that barrier. We have no right to say that the national sovereign, could it now be

consulted, would dispense with the limitation, would remove the barrier, which, in our present opinion, stands opposed to the public good. No, sir, we may not approach this ground. It is dangerous; it is an usurpation of the national sovereignty. We are but agents of the nation, acting under a limited authority. All our acts which exceed that authority are void.

These are the principles to be applied in the investigation of constitutional powers. Let us then examine the constitution upon these principles, and fairly determine whether we are permitted the power for which it has been contended, the constitutional power to remove a judge, by abolishing the office, and, consequently, to deprive him of his salary? The first provision which we find in the constitution relating to the judicial department, is in the second section, where, among other powers enumerated, it is declared that congress shall have power "to establish tribunals inferior to the supreme court." Upon this it was observed by the honorable gentleman from Georgia, (Mr. Jackson,) that this being a grant to congress of a legislative power to establish inferior courts, necessarily includes the power to repeal; that this being a first grant, cannot be restrained nor taken away by any subsequent provision in the constitution upon the same subject; that we are to take the rule of construction, that the first grant, and the first words of a grantor in a deed, shall prevail over a subsequent grant, or subsequent words of a different import. Are we, indeed, sir, to apply in the construction of the constitution, the law, the supreme

law of the nation, the rules devised for the construction of a deed, a grant, by which a few paltry acres are transferred from one individual to another? No, sir, very different are the rules of construction. The first act of the grantor, but the last act of the legislature shall prevail, or where, in any case, is the power to repeal? Another rule more universally applicable, is, that you shall so construe a law that every part of it, if possible, may stand together; that every part may have its operation. Thus, if there be a general provision in the former part of a law, and there follow a particular provision, which cannot take effect unless some part of the former provision be set aside, the latter shall be considered as a limitation of the former, and which shall be carried into effect so far only as it is not incompatible with the latter.

In the third section of the constitution is a further provision, "that the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and appoint." The highest judicial authority shall not be divided into two courts. It shall, to use a ruder phrase, be one and indivisible. I consider it as imperative to congress to establish, not only a supreme court, but also to establish some courts of inferior jurisdiction, which may be modified and extended, from time to time, as experience and future expediency shall dictate, so that it be without violence to any part of the constitution. The words "as congress may from time to time ordain and appoint," were introduced with intent so far to give a

discretion on the subject. The power of erecting courts is here taken for granted, as it is contained in the clause before cited, from the second section, supplied by the general clause by which it is declared that "congress shall have power to make all laws which shall be necessary and proper for carrying into effect all the powers vested by the constitution in the government of the United States, or in any officer or department of the government." I cannot understand it, for how is it possible so to understand it, that the words "may ordain and appoint," in their connection, imply also to abolish? Certainly it is not a necessary implication. That congress are required to make a provision of inferior courts, that the thing is not merely optional, is very clear from another part of this section, declaring to what class the judicial authority of the United States shall be extended. (Read that part of the section.) Here observe, the supreme court has original jurisdiction in the smaller number only of the cases specified, so that without a provision of inferior courts there would be no provision for the greater number, and the judicial authority, instead of being extended to all the cases enumerated, would, in fact, be limited to a few only.

Let us now examine the provision relating to the judges, which is contained in the former part of this section; a provision intended to secure to the judges a proper degree of independence. It is declared that "the judges, both of the supreme court and inferior courts, shall hold their offices during good behavior." The judges of all the courts are placed on the same footing. The expression is not that they shall

continue in office, which might seem to be compulsory, but shall hold their offices, implying, at their option, during good behavior. For a judge may resign, he may accept a place incompatible with the office of judge, as he may, on election, accept the place of senator or representative in congress, by which his office of judge would be vacated by his own act implying a resignation. The force of the expression clearly is, that no judge, either of the supreme or inferior courts, so long as he continues to behave well, can be removed from the office, or the office removed from him by the act of any other. For the expression being general, with one only exception, in the nature of a proviso, that he continues to behave well, it is exclusive of every power, either to remove the judge from the office, or, as has been ingeniously indeed suggested, of removing the office from the judge, causing it to vanish from his hold on any other ground or pretence whatever. It is a well-known rule, that the expression of an exception in any provision, excludes every other exception by implication. Next it follows, "and shall" (the judges shall) at stated times receive for their services a compensation which shall not be diminished during their continuance in office." How long shall they continue to receive, or be entitled to receive, an undiminished compensation or salary? So long as they shall continue to hold their respective offices. And how long are they entitled to hold their offices? So long as they shall continue to behave well. That is, the duration of the time for which they shall be entitled to receive an undiminished salary, shall be equal to the

duration of the time for which they are entitled to hold their offices, equal to the duration of the time in which they shall continue to behave well. What rarely happens in subjects of this nature, the position that the judges cannot, during good behavior, without a direct violation of the constitution, be deprived of their offices, or their salaries, is capable of the highest proof, not merely by a train of probable and metaphysical reasoning, but by the clearest and plainest mathematical demonstration. It is a comparison of quantities in the duration of time; or shall it now, for the first time, be said, that when one quantity, or one length of duration is equal to a second, and the second to a third, that nevertheless they are not equal to each other? Have intuitive truths at length changed their nature? Are they in these times converted to falsehood? Have the clearest axioms of ancient science suffered a revolutionary subversion? No, sir, they remain the same; they are still capable of assisting us to the same infallible conclusions.

The honorable gentleman from Kentucky has told us, that if the construction against which he contended had been contemplated by the framers of the constitution, it would have been explicitly declared, that the judges shall hold their offices and salaries during good behavior, fairly admitting that a declaration, thus explicit, would have been conclusive for the construction of his opponent. Surely it will not be contended that the idiom of the English language is so inflexible, and its interpretation so precise, that identical positions to be equally clear and explicit,

can be expressed by identical words and phrases only. Had the expression been, they should hold their offices and receive their salaries during good behavior, would not the meaning have been the same and equally expressive? Indeed, the word *hold*, though well applied to an office, is not very properly applied to taking the payment of a salary. Or had it been "they shall hold their offices during good behavior and while they continue in office, which is to be during good behavior, they shall continue to receive their salaries, which shall not, during that time, be diminished," it certainly would have been a declaration equally explicit with that suggested by the gentleman. And this, it has been clearly and demonstrably proved, is the same as that which is expressed in the constitution.

I will here, sir, though it might, perhaps, have been more properly done before, make a few observations on the independence of the judiciary. It has been said by some gentlemen, in effect, that though the judges ought to be independent of the executive, though they ought not to hold their offices or salaries, dependent on the will of the president, yet, in a government like ours, there can be no reason why they should not, like the other departments of the government, be dependent on public opinion, and on congress, as properly representing that opinion; that if the judges are made thus independent, if congress cannot remove them by abolishing their offices, or in any other way except that of impeachment for misbehavior, they will become a dangerous body in the state; they may by their discussions on the consti-

tutionality of a law, obstruct the most important measures of government for the public good.

Unfortunately for the argument, this doctrine agrees neither with the nature of our government, which is not vested with the unlimited national sovereignty, but from that derives its powers, nor with the positive and solemn declaration of the constitution. The constitution is a system of powers, limitations and checks. The legislative power is there limited, with even more guarded caution than the executive; because not capable of a check by impeachment, and because it was apprehended, that left unlimited and uncontrolled, it might be extended to dangerous encroachments on the remaining state powers. But to what purpose are the powers of congress limited by that instrument? To what purpose is it declared to be the supreme law of the land, and as such, binding on the courts of the United States, and of the several states, if it may not be applied to the derivative laws to test their constitutionality? Shall it be only called in to enforce obedience to the laws of congress, in opposition to the acts of the several states, and even to their rightful powers! Such cannot have been the intention. But, sir, it will be in vain long to expect from the judges, the firmness and integrity to oppose a constitutional decision to a law, either of the national legislature, or to a law of any of the powerful states, unless it should interfere with a law of congress, if such a decision is to be made at the risk of office and salary, of public character and the means of subsistence. And such will be the situation of your judges, if congress can, by law, or in any other

way, except by way of impeachment, deprive them of their offices and salaries on any pretence whatever. For it will be remembered, that the legislative powers of the several states, as well as those of congress, are limited by the constitution.

For instance, they are prohibited, as well as congress, to pass any bill of attainder, or ex post facto law. The decisions of the judges upon such laws, and such decision, they have already been called upon to make, may raise against them, even in congress, the influence of the most powerful states in the union. In such a situation of the judges, the constitutional limitation on the legislative powers can be but a dead letter. Better would it be they were even expunged.

Thus, sir, it appears that the independence of the judges, even of congress, in their legislative capacity, is agreeable to the nature of our government, to the whole tenor as well as the express letter of the constitution. But, sir, at this late stage of the debate, I will not further enlarge; I will only add, that upon these principles, and with these views of the subject, I shall give a hearty negative to the resolution on your table.

CHAPTER VIII.

Represented the town of Tinmouth, in the Legislature, for several years — Elected one of the Council of Censors, who proposed Amendments to the Constitution, and published the "Constitutionalist" in support of the Amendments.

AFTER the expiration of his senatorial term of six years, Judge Chipman returned to the practice of law, not having an office, but attending to important cases in the different counties. He represented the town of Tinmouth in the legislature, in the years 1806, 1807, 1808, 1809 and 1811. In March, 1813, he was elected one of the council of censors — a council consisting of thirteen persons elected by a general ticket, at the expiration of every seven years, vested with certain censorial powers, and whose duty it is to examine the constitution, and if they find it defective, to propose such amendments as they shall judge will improve it, and to call a convention to consider such amendments, and to adopt or reject each amendment so proposed.

Nathaniel Chipman had ever considered the constitution to be defective, and had a strong desire to have it amended by the constitution of the senate, as a coördinate branch of the legislature — by taking the power of appointment from the legislature and vesting it in a board less liable to a corrupt and cor-

rupting influence, by providing for the appointment of the judges of the supreme court during good behavior, and by constituting a court of chancery distinct from the courts of law. His experience on the bench of the supreme court led him to remark, that for a judge at the same term to turn his attention to the trial of issues of fact and issues of law, and to cases in chancery, required a versatility of talent which fell to the lot of no human being.

This council of censors, to say the least, comprised as much learning, talents, and practical good sense as any one of the numerous councils which have been elected. They proposed the amendments to the constitution above-named, and called a convention to decide upon their adoption or rejection agreeably to the anomalous provision of our constitution.

In support of the proposed amendments, in addition to their address to the people, they published a pamphlet entitled, "The Constitutionalist, or Amendments of the Constitution, prepared by the Council of Censors, supported by the Writings and Opinions of James Willson, L.L. D., late one of the associate judges of the Supreme Court of the United States, and Professor of Law in the College of Philadelphia; also, by the Writings and Opinions of other Eminent Citizens of the United States. With Explanatory Notes of modern date. The only skill and knowledge of any value in politics, is that of governing all by all." *Heracitus, in Sir W. Temple's Miscellany.*

The first amendment, dividing the legislature, by constituting a senate as a coördinate branch, having

in the year 1836 been adopted, there is in every state in the union, as well as in the government of the United States, a senate or council made a coördinate branch of the legislature. And since experience has proved the utility, and even necessity of such division of the legislature, any further discussion of the subject appears useless, I therefore omit the said amendment, and extract from the pamphlet, the other proposed amendments, with the authorities and arguments in support of them, as follows :

Art. 14. In addition to the powers herein before-mentioned, and the ordinary powers and duties of the executive, prescribed by the constitution and laws of this state, the governor shall nominate, and by and with the advice and consent of the senate, appoint all judges in the courts of law and chancery, judges of probate, sheriffs, high bailiffs, justices of the peace, and major and brigadier generals. And also, in like manner, shall nominate and appoint all other officers for whose appointment provision shall not be otherwise made by law or this constitution.

15. The representatives of the several counties shall, at every session of the legislature, from time to time, in county convention, recommend to the governor suitable persons to be appointed justices of the peace in the several towns in their respective counties, when such appointments shall be necessary. And shall, in like manner, when the appointment of a sheriff or high bailiff shall be necessary in any county, recommend two suitable persons for each or either of said offices, as the case may be ; and the governor

shall nominate to each office respectively, one of the two persons recommended.

18. There shall be established in this state a court of chancery, distinct from the courts of law, with general jurisdiction in causes properly determinable in equity.

19. The chancellor shall hold his office on the same tenure, and be removable in the same manner, as is provided in the case of judges of the supreme court; and shall in like manner be secured in his compensation.

20. The judges of the supreme court shall hold their offices, respectively, during good behavior; they shall, nevertheless, be removed from their respective offices, by a resolution of the senate and house of representatives, assigning reasons for such removal; and concurred in by a majority of two-thirds of each house.

The reasons of our prejudices against the executive and judicial powers, explained.

“Habits contracted before the late revolution of the United States, operate in the same manner since that time, though very material alterations may have taken place in the objects of their operations. Before that period, the executive and the judicial powers of government were placed neither in the people, nor in those, who professed to receive them under the authority of the people. They were derived from a different and a foreign source; they were regulated by foreign maxims; they were directed to foreign purposes. Need we be surprised that they were

objects of aversion and distrust? Need we be surprised that every occasion was seized for lessening their influence and weakening their energy? On the other hand, our assemblies were chosen by ourselves. They were the guardians of our rights, the objects of our confidence, and the anchor of our political hopes. Every power which could be placed in them was thought to be safely placed; every extension of that power was considered as an extension of our own security.

At the revolution, the same fond predilection and the same jealous dislike existed and prevailed. The executive and the judicial, as well as the legislative authority, was now the child of the people; but to the two former the people behaved like step-mothers. The legislature was still discriminated by excessive partiality; and into its lap every good and precious gift was profusely thrown. Even at this time people can scarcely divest themselves of those opposite prepossessions; they still hold the language which expresses them, though, perhaps, they do not perceive the delusive mistake. In observations on this subject, we hear the legislature mentioned as the *people's representatives*. The distinction intimated by implication, though probably not avowed upon reflection, is, that the executive and judicial powers are not connected with the people by a relation so strong, or near, or dear. But it is high time that we should chastise our prejudices; and that we should look upon the different parts of government with a just and impartial eye. The executive and judicial powers are now drawn from the same source, are now

animated by the same principles, and are now directed to the same ends with the legislative authority ; they who execute, and they who administer the laws, are as much the servants, and therefore, as much the friends of the people as they who make them. The character and interest and glory of the two former are as intimately and as necessarily connected with the happiness and prosperity of the people, as the characters, and interests, and glory of the latter are. Besides the execution of the law and the administration of justice under the law, bring it home to the fortunes, and farms, and houses, and business of the people. Ought the executive or the judicial magistrates, then, to be considered as foreigners ? Ought they to be treated with a chilling indifference. 1 *Wilson's Works*, 398, 899.

The Executive Power.

The council of censors observe, that, "it is too obvious to need proof, that bodies of men are unstable in proportion as they are numerous ; and conduct without due consideration and regard to the public interest in proportion as their responsibility is shared by numbers. We have, therefore, thought it advisable to confer the power of nomination to office on the governor, who, by his annual election, is immediately responsible to the people ; and the power of controlling appointments to office in pursuance of his nomination, on the senate, the less numerous branch of the legislature. The council hope, by these means, to leave the choice of the members of the legislature more free from the influence of designing men,

who may often promote the election of individuals, in order that themselves, in their turn, may be promoted. And also to relieve the legislature itself from the corrupting influence of a too frequent exercise of the power of appointment, as well as to save much time of the legislature and expense to the state, now wasted in the present mode of electing officers." Judge Wilson, speaking on this subject, says — "the executive as well as the legislative power ought to be restrained. But there is a remarkable contrast between the proper modes of restraining them. The legislature, in order to be restrained, must be *divided*. The executive power, in order to be restrained, should be *one*. Unity in this department is at once a proof and an ingredient of safety and of energy in the operations of government.

"The restraints on the legislative authority must, from its nature, be chiefly internal; that is, they must proceed from some part or division of itself. But the restraints on the executive power are external. These restraints are applied with greatest certainty, and with greatest efficacy, when the object of restraint is clearly ascertained. This is best done when one object only, distinguished and responsible, is conspicuously held up to the view and examination of the public.

"In planning, forming, and arranging laws, deliberation is always becoming, and always useful. But in the active scenes of government there are emergencies in which the man, as, in other cases, the woman, who deliberates, is lost. Secrecy may be equally necessary as despatch. But can either secrecy

or despatch be expected when, to every enterprise, and to every step in the progress of every enterprise, mutual communication, mutual consultation, and mutual agreement, among men, perhaps of discordant views, of discordant tempers, and of discordant interests, are indispensably necessary? How much time will be consumed; and when it is consumed, how little business will be done? When the time is elapsed; when the business is unfinished; when the state is in distress, perhaps, on the verge of destruction; on whom shall we fix the blame? Whom shall we select as the object of punishment? Ruinous dissensions are not the only inconveniences resulting from a numerous executive body; it is equally liable to pernicious and intriguing combinations. When the first takes place, the public business is not done at all; when the last takes place, it is done for mean or malicious purposes.

“The appointment to office is an important part of the executive authority. Much of the ease, much of the reputation, much of the energy, and much of the safety of the nation depends on judicious and impartial appointments. But are impartiality and fine discernment likely to predominate, in a numerous executive body? In proportion to their own number will be the number of their friends, favorites, and dependents. An office is to be filled. A person nearly connected by some of the foregoing ties with one of those who are to vote in filling it, is named as a candidate. His patron is under the necessity to take any part, particularly responsible in his appointment. He may appear even cold and indifferent on the occasion.

But he possesses an advantage, the value of which is well understood in bodies of this kind. Every member who gives, on his account, a vote for his friend, will expect the return of a similar favor on the first convenient opportunity. In this manner a reciprocal intercourse of partiality, of interestedness, of favoritism, perhaps of venality, is established; and in no particular instance is there a practicability of tracing the poison to its source. Ignorant, vicious and prostituted characters are introduced into office; and some of those who voted, and procured others to vote for them, are the first and loudest in expressing their astonishment, that the door of admission was ever opened to men of their infamous description. The suffering people are thus wounded and buffeted, like Homer's Ajax in the dark, and have not even the melancholy satisfaction of knowing by whom the blows are given. Those who possess talents and virtues, which would reflect honor on office, will be reluctant to appear as candidates for appointments. If they should be brought into view, what weight will virtue, merit and talents for office have, in a balance held and poised by partiality, intrigue and chicanery?

“The person who nominates or makes appointments to office should be known. His own office, his own character, his own fortune should be responsible. He should be alike unfettered and unsheltered by counsellors. No constitutional stalking-horse should be provided for him, to conceal his turnings and windings, when they are too dark and too crooked to be exposed to public view. Instead of the dishonorable intercourse, which I have already men-

tioned, an intercourse of a very different kind should be established — an intercourse of integrity and discernment, on the part of the magistrate who appoints, and of gratitude and confidence on the part of the people, who will receive the benefit from his appointments. Appointments made and sanctioned in this highly respectable manner, will, like a fragrant and beneficent atmosphere, diffuse sweetness and gladness around those to whom they are given. Modest merit will be beckoned to, in order to encourage her to come forward. Barefaced impudence and unprincipled intrigue will receive repulse and disappointment, deservedly their portion.

“If a contrary conduct should unfortunately be observed, and unfortunately, a contrary conduct will be sometimes observed, it will be known by the citizens whose conduct it is; and, if they are not seized with the only distemper incurable in a free government — the distemper of being wanting to themselves — they will, at the next election, take effectual care that the person who has once shamefully abused their generous and unsuspecting confidence, shall not have it in his power to insult and injure them a second time by the repetition of such an ungrateful return.

“The observations, which I have made on the appointments to office, will apply, with little variation, to the other powers and duties of the executive department.

“If the executive power of government is placed in the hands of one person, who is to direct all the subordinate offices of that department, is there not reason to expect, in his plans and conduct, prompt-

itude, activity, firmness, consistency and energy? These mark the proceedings of one man; at least, of one man fit to be intrusted with the management of important public affairs. May we not indulge, at least in imagination, the pleasing prospect, that this one man — the choice of those who are deeply interested in a proper choice — will be a man distinguished for his abilities? Will not those abilities pervade every part of his administration? Will they not diffuse their animating influence over the most distant corners of the nation? May we not further indulge the pleasing imagination, in the agreeable prospect — in one instance, at least, it is realized by experience — that the public choice will fall upon a man, in whom distinguishing abilities will be joined, and sublimed by distinguished virtues — on a man, who, on the necessary foundation of private character, decent, respected and dignified, will build all the great, and honest, and candid qualities, from which an elevated station derives its most beautiful lustre, and public life its most splendid embellishments?

“If these pleasing prospects should unhappily be blasted by a preposterous choice, and by a preposterous conduct of the magistrate chosen, still, at the next election, an effectual remedy can be applied to the mischief; and this remedy will be applied effectually, unless, as has been already intimated, the citizens should be wanting to themselves. For a people wanting to themselves, there is indeed no remedy in the political dispensary. From their power there is no appeal; to their error, there is no superior principle of correction.” 1 *Wilson's Works*, 400–404.

Note 1.

1. I will examine this subject further. By art. 2, sec. 2, of the federal constitution, the president "shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers, and consuls; judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law."

If we compare this with the 14th article of the amendments, we find a likeness in the manner of appointing officers; the president nominates, and by and with the advice and consent of the senate appoints; so does the governor. The president appoints officers in every state; the governor appoints in this state. Would the president, who resides in the city of Washington, be likely to know who are qualified to be attorney and marshal in Vermont district as well as the governor, who resides here, would know, who are qualified to be sheriffs and high-bailiffs, in the several counties? No. This, then, is a reason why the governor should rather be entrusted to nominate sheriffs and high-bailiffs, than the president to nominate the attorney and marshal. The governor's means of information are better, therefore he would be more likely to nominate suitable persons. If all our representatives in congress should unitedly recommend A. to the president as a suitable person to be appointed attorney or marshal of this district, would the president be obliged to nominate him? No. The federal constitution does not require it. But if the

representative of a county, in county convention, recommend A. and B. as suitable persons to be sheriff, in their county, the governor, by the latter part of the 15th article of the amendments, is obliged to nominate one of them to the senate for the office. So it is as to high-bailiff. Here, then, we see restrictions laid upon the governor that are not upon the president. We will now attend to the former part of the 15th article, namely: "The representatives of the several counties shall, at every session of the legislature, from time to time, in county convention, recommend to the governor *suitable* persons to be appointed justices of the peace in the several towns in their respective counties, when such appointments shall be necessary." This clause shows it to be not only the duty but the *right* of the representatives of such county to recommend to the governor *suitable* persons to be appointed justices of the peace. Right and obligation are reciprocal; that is, wherever there is a *right* in one or more persons, there is a corresponding *obligation*, either express or implied. Here the representatives have a constitutional *right* to recommend *suitable* persons — to whom? to the governor. Now it is absurd, to suppose the governor is not under *obligation* to regard such recommendation in making his nomination to the senate. It is not, however, to be understood that the governor, who is responsible to the people, has no voice in this business. He is to exercise a sound discretion, and if he find that the representatives, in convention, have recommended an *unsuitable* person for the office, he will say that they had not a *right* to do it, and he is

not *obliged* to regard such recommendation. Some may object, that these county conventions will fetter and shelter the governor too much with councillors ; that they will serve as a constitutional stalking-horse to conceal his turnings and windings. There is weight in the objection. The governor, if inquired of why he appointed such and such persons, sheriff, high-bailiff, and justices, may answer that they were recommended to him by the representatives of the county in county convention ; still I believe there is a propriety in having county conventions to recommend. It is what we have been accustomed to with this *variation* ; that instead of carrying their recommendations to the joint committee of both houses, they lay them before the governor, and he lays them before the senate. If, on close examination, the persons recommended are found *suitable* for the offices, they will be appointed ; otherwise, not. It is hoped that the people will receive some benefit from this *variation* ; that the characters and qualifications of persons recommended by conventions will be more thoroughly inquired into by the governor and senate than they have heretofore been by the joint committee of both houses. Even if an *unsuitable* person should be recommended to the governor, and the governor should nominate him to the senate, it is expected that the senate, if they know the person to be *unsuitable*, will withhold advice and consent to his appointment to office. With so much caution — and there cannot be too much caution — persons who cannot read and write, and persons of bad moral character, will not likely be appointed justices of the peace ;

some such have heretofore been appointed (incautiously) by the joint committee of both houses.

Again, if a known bankrupt should induce the representatives of his county to agree on him for a sheriff, and, in county convention, they should recommend him to the governor for the office, the governor would not be likely to nominate him to the senate, or if he did, the senate would not be likely to give their advice, and consent to his appointment. But, how often such persons have been appointed sheriffs by the joint committee of both houses, not only to the damage of individuals, but to the injury of the state.

If the representatives of each county, in county convention, can recommend *suitable* persons to be appointed sheriff, high-bailiff, and justices of the peace in their respective counties, and this recommendation is obligatory on the governor to nominate them to the senate, why need the representatives complain because the appointment does not ultimately depend upon them? If they can have the very men they recommend, what more do they want? Do they wish *unsuitable* persons to be appointed, in case they should happen to recommend some to the governor?

If the governor and senate are as much the servants, therefore, as much the friends of the people as the representatives are, why should the people be unwilling to trust them to give a final vote in the choice of their officers? It is said by Judge Wilson, that "the character and interest and glory of the governor and senate are as intimately and necessarily connected with the happiness and prosperity of the peo-

ple as the character, and interest, and glory of the representatives are." Why then not trust them as soon? Is it because they are fewer in *number* than the representatives? Do wisdom and patriotism consist in *numbers*? If so, then double the number of your representatives, and you double their wisdom and patriotism.

This would be a fortunate thing for the people — more wisdom and more patriotism in that branch would do us no harm. But wisdom and patriotism do not consist in *numbers*, and it is hoped that as much of these will fall to the share of the governor and senate as the other branch of the legislature, and that they will be more competent to appoint suitable persons to fill the aforesaid offices.

As to the more important offices, which do not concern one county more than another, it *seems* highly proper that the governor should nominate suitable persons to fill them.

Note 2.

The provision contained in the 14th article of the amendments, which empowers the governor to nominate, and by and with the advice and consent of the senate, appoint all judicial officers, &c., is founded upon principles which are unquestionable in their nature, and in strict conformity to the common sense and reason of mankind. Yet it is to be feared, that passion may triumph over reason, and good sense be forced to yield to inveterate prejudice. We know that habits, once formed and become familiar, are not easily laid aside. It may be difficult to per-

suade those who have been, or expect to be, members of the house of representatives, to transfer from that body a power, to the use of which its members have been so long accustomed, and which they have found to be, in their hands, such efficient means of self-aggrandizement. We have no hesitation in declaring the opinion, that the power of appointment to office could not have been placed in more improper

ciety ; and to prevent the unbiased exercise of their opinions in the decision of causes between men high in office or influence, and the members of the lower and more ordinary classes of society, and thereby corrupt the fountain as well as the streams of justice. The members of the council, therefore, thought it their duty to devise and recommend an amendment of the constitution, rendering the judiciary so far independent as to place them above the influence of popular party or personal motives ; and yet liable to removal for reasonable objections, which do not amount to cause of impeachment. They have, therefore, proposed so to amend the constitution as to have them appointed during good behavior, yet removable by the resolution of both houses of the legislature, passed by two-thirds of the members of each, as being the best medium between absolute independence and an entire dependence on the representatives of the people. The ordinary judges of the courts of common jurisdiction, it has been thought expedient, should hold their offices for the term of five years, removable in the same manner. Chancery powers cannot, from their nature, be accurately defined or limited, and are, therefore, in some measure dangerous ; yet, when reduced to system by practice and prudence, highly useful, important and necessary. The inconvenience of the exercise of these powers by the judges of a court of common law jurisdiction, has been unhappily experienced by the suitors in our courts. Great delay in causes in chancery have been occasioned by want of time, and hurry of business on the law side of the court. Necessary rules and orders

for bringing causes to a hearing and decision cannot be adopted and maintained in our present system, and the unavoidable precipitancy in the proceedings, forbids the expectation of the attainment of correct decisions by the proper discussion of the parties and the deliberation of the court. The council has, therefore, recommended the establishment of a court, with chancery powers, distinct from the courts of law.

In reasoning upon this subject, Judge Wilson says:

“The third great division of the powers of government is the judicial authority. It is sometimes considered as a branch of the executive power, but inaccurately. When the decisions of courts of justice are made, they must, it is true, be executed; but the power of executing them is ministerial, not judicial. The judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases in which the manner or principles of this application are disputed by the parties interested in them.

“The very existence of a dispute is presumptive evidence, that the application is not altogether without intricacy or difficulty. When intricacy or difficulty takes place in the application, it cannot be properly made without the possession of skill in the science of jurisprudence, and the most unbiased behavior in the exercise of that skill. Clear heads, therefore, and honest hearts are essential to good judges.

“As all controversies in the community respecting life, liberty, reputation and property must be influenced by their judgments, and as their judgments

be expected from judges who are liable to be tossed about by every veering gale of politics, and who can be secured from destruction only by dexterously swimming along with every successive tide of party? Is there not reason to fear, that in such a situation the decisions of courts would cease to be the voice of law and justice, and would become the echo of faction and violence?

“This is a subject that most intimately concerns every one who sets the least value upon his own safety, or that of his posterity. Our fortunes, our lives, our reputations, and our liberties are all liable to be affected by the judgments of the courts. How distressing and melancholy must the reflection be, that while judges hold their salaries only at pleasure, and their commissions only for the term of a few years, our liberties, our fortunes, our reputations and our lives may be sacrificed to a party, though we have done nothing to forfeit them to the law.” 1 *Wilson's Works*, 405-407.

I might here, with great propriety, quote from the book called *The Federalist*, written by Messrs. Madison, Hamilton and Jay, their sentiments respecting *independency* in the judiciary, were it not for swelling this work beyond its intended size. They wrote after the convention had recommended the federal constitution, and before its adoption, in favor of the principles contained in that instrument. A single passage will be enough to show their sentiments on this point. They say, “Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have

established *good behavior* as the tenure of judicial offices, in point of duration ; and, that so far from being blamable on this account, their plan would have been inexcusably defective, if it had wanted this important feature of good government."

We learn Mr. Jefferson's sentiments on this subject by looking into his proposed constitution for Virginia. There we find him to say, that "the judges of the high court of chancery, general court" of common law, "and courts of admiralty, should be appointed, &c. and to hold their offices *during good behavior*."¹ He would have them removable only by impeachment.

Note 3.

I now propose to examine the constitutions of the several states in relation to the judiciary department. And this examination will, I think, not only remove all scruples as to the *republicanism* of an independent judiciary, but also afford some testimony in favor of its establishment in Vermont. The institutions of other states, approved by many years experience, by all political parties, are surely entitled to some consideration. We cannot doubt but that the framers of these constitutions had solely the security of the rights of the people in view, not the aggrandizement of any person or party. That there should be differences of opinion, on various points, is not extraordinary. But that all the states which have formed constitutions, should have so nearly agreed on the

¹ Jefferson's Notes, 209.

subject of the independence of the judiciary, would certainly be extraordinary, if there was nothing in its principle favorable to the impartial administration of justice, and to the security of the rights of the people.

New Hampshire. — “All judicial officers duly appointed, commissioned, and sworn, shall hold their offices during good behavior, excepting those concerning whom there is different provision made in this constitution. Provided, nevertheless, the governor, with consent of council, *may* remove them upon the address of both houses of the legislature. No person shall hold the office of judge of any court after he has attained the age of seventy years.” (Adopted 1792.)

Massachusetts. — Chap. 3, art. 1. “All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this constitution. Provided, nevertheless, the governor, with the consent of the council, *may* remove them upon the address of both houses of the legislature.” (Adopted 1780.)

Rhode Island. — This state has formed no constitution. The charter of Charles II. forms the basis of its government. Under that their judges are annually elected, and their courts are such as might be expected.

Connecticut. — This state *has formed* no constitution. Their judges, though chosen annually, are, in practice, appointed during good behavior. In this state there has been no change of parties. But

should parties fluctuate as in Rhode Island, the same fate would probably await their judges, unless the spirit of party should be contracted by the steady habits *peculiar* to the state of Connecticut. The following is the third section of the fifth article of the constitution of Connecticut, adopted in the year 1818.

The judges of the supreme court of errors, of the superior and inferior courts, and all justices of the peace, shall be appointed by the general assembly, in such manner as shall by law be prescribed. The judges of the supreme court and of the superior court shall hold their offices during good behavior ; but may be removed by impeachment ; and the governor shall also remove them on the address of two-thirds of the members of each house of the general assembly. All other judges and justices of the peace shall be appointed annually. No judge or justice shall hold his office after he shall arrive at the age of seventy years.

New York. — Art. 24 (ordains) “ That the chancellor, the judges of the supreme court, and first judge of the county court in every county, shall hold their offices during good behavior, or until they shall have respectively attained the age of sixty years.” They are removable only by impeachment. Adopted 1777.

New Jersey. — Art. 12. “ The judges of the supreme court shall continue in office for seven years ; the judges of the inferior court of common pleas, &c. shall continue in office for five years.” They are removable only by impeachment. Adopted 1776.

Pennsylvania. — Art. 5, sec. 2. “ The judges of the

supreme court, and of the several courts of common pleas, shall hold their offices during good behavior. But for any reasonable cause, which shall not be sufficient ground for impeachment, the governor *may* remove any of them on the address of two-thirds of each branch of the legislature. Adopted 1790.

Delaware. — Art. 6, sec. 2. "The chancellor and judges of the supreme court and the courts of common pleas, shall hold their offices during good behavior. But for a reasonable cause, which shall not be a sufficient ground for impeachment, the governor *may, in his discretion,* remove any of them, on the address of two-thirds of *all* the members of each branch of the legislature." Adopted 1792.

Maryland. — Art. 49. "The chancellor, all judges, &c. shall hold their commissions during good behavior, removable *only* on conviction in a court of law." Adopted 1776.

Virginia. — ". . . Judges of the supreme court of appeals, judges in chancery, judges of admiralty, &c. to be commissioned by the government, and continue in office during good behavior, removable *only* by impeachment, except in a case of incapacity." Adopted 1776.

North Carolina. — Art. 13. ". . . Judges of the supreme courts of law and equity, judges of admiralty, &c. to be commissioned, &c. and hold their offices during good behavior, removable *only* by impeachment." Adopted 1776.

South Carolina. — Art. 3, sec. 1. "The judiciary power shall be vested in such superior and inferior courts of law and equity, as the legislature shall, from

time to time, direct and establish. The judges of each shall hold their commissions during good behavior," removable *only* by impeachment. Art. 5, sec. 1. "But no impeachment shall be made unless with the concurrence of *two-thirds* of the house of representatives. Adopted 1790.

Georgia. — Art. 3, sec. 1. "The judges of the superior court shall be elected for the term of three years, removable by the governor on the address of *two thirds* of both houses, or by impeachment and conviction thereon." Sec. 4. "Justices of the inferior courts shall be appointed, &c. and hold their commission during *good behavior*, or as long as they respectively reside in the county for which they shall be appointed," unless removed as in section first. Adopted 1798.

Tennessee. — Art. 5. "... Shall appoint judges of the several courts of law and equity, &c. who shall hold their respective offices during good behavior," removable only by impeachment. Adopted 1796.

Kentucky. — Art. 4. "The judges both of the supreme and inferior courts, shall hold their offices during good behavior; but for any reasonable cause, which shall not be sufficient ground for impeachment, the governor *shall* remove any of them on the address of *two-thirds* of each house of the general assembly." Adopted 1799.

Ohio. — Sec. 7. "The judges of the supreme court, the presidents and the associate judges of the courts of common pleas, shall be appointed, &c. and shall hold their offices for the term of seven years, if so long they behave well," removable *only* by impeachment. Adopted 1802.

Louisiana. — The following is the 5th section of the 4th article in the constitution of Louisiana: "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior; but, for any reasonable cause, which shall not be sufficient ground for impeachment, the governor shall remove any of them on the address of three-fourths of each house of the general assembly. Provided, however, that the cause or causes for which such removal may be required, shall be stated at length in the address, and inserted on the journal of each house."

On a review of the constitutions of the several states it appears, that no state which *has formed* a constitution, except Vermont, elects its judges annually.

That only two states elect their judges annually, namely, Rhode Island and Connecticut.

That only three states elect their judges for a term of years, namely, New Jersey, for seven years; Georgia (its supreme court) for three years, and Ohio for seven years.

That eleven states elect their judges during good behavior, namely, New Hampshire, Massachusetts, New York, Pennsylvania, North Carolina, South Carolina, Tennessee, Kentucky, Delaware, Maryland and Virginia.

That of these, only two limit the duration of office by age, namely, New Hampshire to seventy, and New York to sixty.

That in no state are the judges removable by the address of a majority of both houses.

That in two states *the governor, with the consent of*

council, MAY remove upon the address of a majority, namely, Massachusetts and New Hampshire.

That in three states the governor *may* remove on the address of *two-thirds* of both houses, namely, Pennsylvania, Delaware and Georgia.

That in one state the governor *shall* remove the judges on the address of *two-thirds* of both houses, namely, Kentucky.

That in five states the judges are removable only on impeachment, &c. New Jersey, Virginia (except for incapacity,) North Carolina, South Carolina and Tennessee.

That in one state they are removable only on conviction in a court of law, namely, Maryland. *Spooner's Vermont Journal*.

Note 4.

Judge Jeffries. — He held his office *durante bene placito*, of the crown. "When his master abdicated the throne his own security lay only in flight. From the law, the law's worst assassin could expect no protection. That he might escape unknown, he shaved his eye-brows, put on a seaman's habit, and all alone made the best of his way to Wapping, with a design to take shipping for a foreign country. But his countenance could not remain undiscovered under all this disguise; a man, whom, upon a trial, he had frightened almost into convulsions, no sooner got glimpse of it, than in a moment he recollected all the terrors he had formerly felt. Notice was instantly given to the mob, who rushed in upon him like a herd of wolves. He was goaded on to the lord mayor; the

lord mayor, seeing a man on whom he had never looked without trembling, brought before him in this situation, fell into fits, was carried to his bed, and never rose from it. On his way to the tower, to which he was committed, he saw threatening faces on every side; he saw whips and halters held up around him, and cried out in an agony "for the Lord's sake keep them off." I saw him, I heard him, says a cotemporary historian, and without pity too; though without pity I never saw any other malefactor."¹

Even Jeffries might have been a good judge had he held his office independent of the crown. The English people felt the want of this independency in their judges, and struggled for it until they, in a measure, obtained their object. An act was passed 13 W. III. entitled "An act for the further limitation of the crown, and *better* securing the rights and liberties of the subject," in which provision is made that the commissions of the judges shall be, not as formerly, "*durante bene placito*," but "*quamdiu bene se gesserint*."

If Judge Jeffries was the law's worst assassin when he held his office, during the pleasure of *one* despot, what would he have been had he held his office for a year, or during the pleasure of (Mr. Jefferson's) one hundred and seventy-three despots?² It is impossible to tell; it is however, probable, that one hundred and seventy-three despots would have kept him in office as long as one did; if he held his office for a

¹ Guth. 1063.

² See page 36, Mr. Jefferson's Notes, for his opinion of one hundred and seventy-three despots.

year, he might have been reappointed, year after year, notwithstanding all his oppression and cruelty.

It is a work of pleasure to quote on this subject the writings of Mr. Jefferson. He says, in his Notes on Virginia, page 117, that "Every species of government has its specific principles. Ours, perhaps, are more peculiar than those of any other in the universe. It is a composition of the *freest* principles of the English constitution, with others, derived from natural right and natural reason." He meant to be understood, that the provision, to hold the office of judge *quamdiu bene se gesserint*, or *during good behavior*, is one of these *first* principles; he therefore introduced it into his draft of a constitution for the people of Virginia. Let the people of Vermont adopt the same principle.

Upon the propriety of fixing upon a certain age beyond which a judge cannot constitutionally hold his office.

Judge Wilson, with much pleasantry remarks, that "The duration assigned by nature to human life is often complained of as very short; that assigned to it by some politicians is much shorter. For some political purposes, a man cannot breathe before he numbers thirty-five years; as to other political purposes, his breath is extinguished the moment he reaches sixty. By the constitution of New York, "the chancellor, the judges of the supreme court, and the first judge of the county court in every county, hold their offices until they shall have respectively attained the age of sixty years."

How differently is the same object received, at

different times, and in different countries. In New York, a man is deemed unfit for the first offices of the state *after* he is sixty; in Sparta, a man was deemed unfit for the first offices of the state *till* he was sixty. Till that age no one was entitled to a seat in the senate, the highest honor of the chief. How convenient it would be, if a politician possessed the power, so finely exercised by the most beautiful of poets! Virgil could, with the greatest ease imaginable, bring Æneas and Dido together; though in fact, some centuries elapsed between the times in which they lived. Why cannot some politician, by the same or some similar enchanting art, produce an ancient and a modern government as cotemporaries? The effect would be admirable. The moment that a gentleman of sixty would be disqualified for retaining his seat as a judge of New York, he would be qualified for taking his seat as a senator of Sparta. 2 *Wilson's Works*, 144.

Balance of Power.

“The true meaning of a balance of power,” says John Adams, “is best conceived by considering what the nature of a balance is. It supposes three things; first, the part which is held, together with the hand that holds it; and then the two scales, with whatever is weighed therein. In a state within itself, the balance must be held by a third hand, who is to deal the remaining power, with the utmost exactness into the several scales. The balance may be held by the weakest, who, by his address, removing from either scale, and adding his own, may keep the scales duly

poised ; when the balance is broken by mighty weights falling into either scale, the power will never continue long, in equal division between the two remaining parties, but, till the balance is fixed anew, will run entirely into one." *Adams's Defence*, vol. 1, p. 100.

Let the people take care of the balance, and especially their part of it ; but the preservation of their peculiar part of it will depend still upon the existence and independence of the other two ; the instant the other branches are destroyed, their own branch, *their own deputies become their tyrants*. *Ibid.* 370.

Judge Wilson, treating of this subject, says, " though the foregoing great powers — legislative, executive and judicial — are all necessary to a good government, yet it is of the last importance that each of them be preserved distinct and unmingled, in the exercise of its separate powers, with either or with both of the others. Here every degree of confusion in the plan will produce a corresponding degree of interference, opposition, or perplexity in its execution. Let us suppose the legislative and executive powers united in the same person ; can liberty or security be expected ? No. In the character of executive magistrate, he receives all the power, which, in the character of legislator, he thinks proper to give. May he not, then — and if he may, will he not, then — such is the undefined and undefinable charm of power — enact tyrannical laws to furnish himself an opportunity of executing them in a tyrannical manner ?

Liberty and security in government depend not on the limits which the rulers may please to assign to the

exercise of their own powers, but on the boundaries, within which their powers are circumscribed by the constitution. He who is continually exposed to the lash of oppression, as well as he who is immediately under it, cannot be denominated free.

“Let us suppose the legislative and judicial powers united, what would be the consequence ?

“The lives, liberties and properties of the citizens would be committed to arbitrary judges, whose decisions would, in effect, be dictated by their own private passions, and would not be governed by any fixed or known principles of law. For though, as judges, they might be bound to observe those principles, yet, Proteus-like, they might immediately assume the form of legislators, and in that shape they might escape from every fetter and obligation of law.

“Let us suppose a union of the executive and judicial powers ; this union might soon be an overbalance for the legislative authority ; or if that expression is too strong, it might certainly prevent or destroy the proper and legitimate influence of that authority. The laws might be eluded or perverted, and the execution of them might become, in the hands of the magistrate, or in his minions, an engine of tyranny and injustice. Where and how is redress to be obtained ? From the legislature ? They make new laws to correct the mischief ; but these new laws are to be executed by the same persons, and will be executed in the same manner as the former. Will redress be found in the courts of justice ? In those courts, the very persons who were guilty of the op-

pression in their administration, sit as judges to give a sanction to their oppression by their decrees. Nothing is more to be dreaded than maxims of law and reasons of state blended together by judicial authority. Among all the terrible instruments of arbitrary power, decisions of courts, whetted, and guided and impelled by considerations of policy, cut with the keenest edge, and inflict the deepest and most deadly wounds.

“Let us suppose, in the last place, all the three powers of government to be united in the same man, or body of men, miserable indeed would the case be ! This extent of misery, however, at least in Europe, is seldom experienced ; because the power of judging is generally exercised by a separate department. But in Turkey, where all three powers are joined in the Sultan’s person, his slaves are crushed under the insupportable burthen of oppression and tyranny. In some of the governments of Italy, these three powers are also united. In such there is less liberty than in European monarchies ; and their governments are obliged to have recourse to as violent measures to support themselves as even that of the Turks. At Venice, where an aristocracy, jealous and tyrannical, absorbs every power, behold the state inquisitors, the lion’s mouth, at all times open for the secret accusations of spies and informers. In what a situation must the wretched subjects be under such a government, all the powers of which are leagued, in awful combination, against the peace and tranquillity of their minds.

“But, further ; each of the great powers of gov-

ernment should be independent as well as distinct. When we say this it is necessary — since the subject is of primary consequence in the science of government — that our meaning be fully understood and accurately defined. For this position, like every other, has its limitations ; and it is important to ascertain them.

“ The independence of each power consists in this, that its proceedings and the motives, views and principles, which produce those proceedings, should be free from the remotest influence, direct or indirect, of either of the other two powers. But further than this, the independency of each power ought not to extend. Its proceedings should be formed without restraint, but, when they are once formed, they should be subject to control.

“ We are now led to discover, that between these three great powers of government there ought to be a natural dependency as well as a mutual independency. We have described their independency ; let us now describe their dependency. It consists in this, that the proceedings of each, when they come forth into action and are ready to affect the whole, are liable to be examined and controlled by one or both of the others.

“ So far are these different qualities of mutual dependency and mutual independency from opposing or destroying each other, that, without one, the other could not exist. Wherever the independency of one, or more than one, is lost, the mutual dependency of the others is that moment lost likewise ; it is changed into a constant dependency of that one part on two ; or as the case may be, of those two parts on one.

“An example may illustrate the foregoing propositions. They cannot be explained too fully. The congress is intrusted with the legislative power of the United States. In preparing bills, in debating them, in passing them, in refusing to pass them, their resolutions and proceedings should be uncontrolled and uninfluenced. Here is the independency of the legislative power. But after the proceedings of the legislature are finished, so far as they depend on it, they are sent to be examined, and are subject to a given degree of control by the head of the executive department. Here is the dependency of the legislative power. It is subject also to another given degree of control by the judiciary department, whenever the laws though in fact passed, are found to be contradictory to the constitution.

“The salutary consequence of mutual dependency of the great powers of government is, that if one part should, at any time, usurp more power than the constitution gives, or make an improper use of its constitutional power, one or both the other parts may correct the abuse, or may check the usurpation.

“The total disjunction of these powers would, in the end, produce that very union against which it seems to provide. The legislature would soon become tyrannical, and would assume to itself the rights of the executive and judicial powers.

“The important conclusion to be drawn from the premises, which we have established is, that in government, the perfection of the whole depends on the balance of the parts, and the balance of the parts consists in the independent exercise of their separate

powers, and when their powers are separately exercised, therein consists their mutual influence and operation on one another. Each part acts and is acted upon, supports and is supported, regulates and is regulated by the rest.

“It might be supposed, that these powers, thus mutually checked and controlled, would remain in a state of inaction. But there is a necessity for movement in human affairs, and these powers are forced to move, though still, to move in concert. They move, indeed, in a line of direction somewhat different from that, which each acting by itself, would have taken; but at the same time, in a line partaking of the natural direction of each, and formed out of the natural directions of the whole — the true line of public liberty and happiness.” *Wilson's Works*, 407–411.

Another eminent man, Thomas Jefferson, late president of the United States, speaking of the old constitution of Virginia, which had its three powers without a balance, says,

“All the powers of government, legislative, executive and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of a despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not a single one. *One hundred and seventy-three despots* would surely be as oppressive as *one*. Let those who doubt it turn their eyes on the republic of Venice. As little will it avail us that they are chosen by ourselves. An *elective despotism* was not the government we fought for, but one which should not only be founded on free principles,

but in which the powers of government should be so divided and balanced among several bodies of majesty, as that no one could transcend their legal limits without being effectually checked and restrained by the others.

For this reason that convention, which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. *But no barrier was provided between these several powers. The judiciary and executive members were left dependent on the legislative for their subsistence in office, and some of them for their continuance in it.* If, therefore, the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have accordingly, in many instances, decided rights which should have been left to judiciary controversy; and the direction of the executive, during the whole time of their session, is becoming habitual and familiar. And this is done with no ill intention. The views of the present members are perfectly upright. When they are led out of their regular province, it is by art in others, and inadvertence in themselves. And this will probably be the case for some time to come. But it will not be a very long time. Mankind soon learn to make interested uses of their right and power which they pos-

sess, or may assume. The public money and public liberty, intended to have been deposited with three branches of magistracy, but found inadvertently to be in the hands of one only, will soon be discovered to be sources of wealth and dominion to those who hold them; distinguished too by this tempting circumstance, that they are the instrument as well as the object of acquisition. With money, we will get men, said Cæsar, and with men we will get money. Nor should our assembly be deluded by the integrity of their own purposes, and conclude that these unlimited powers will never be abused, because themselves are not disposed to abuse them." *Notes on Virginia*, 161, 162.

Mr. Jefferson, without intending it, has here given, in anticipation, a striking description of the government of Vermont, and furnished unanswerable arguments in favor of the amendments.

When the convention, called to consider the proposed amendments to the constitution, assembled, they rejected them in gross without the least discussion of their merits—they were blown off by the spirit of party, as proposed amendments to the constitution, in almost every instance, have been. The council of censors are elected by a general ticket, and if not all taken from the dominant party, they are selected by that party; and whatever amendments such council may propose, will be received in an unfavorable light by their political opponents. And when the members of the convention assemble, their discordant views in relation to amending the constitution, cannot be reconciled by any compromise; the

powers of the convention being restricted to the simple adoption or rejection of each article proposed, without the least alteration.

After the amendment of the constitution, in the year 1836, by constituting a senate, Judge Chipman wrote to his correspondent, who had given him an account of the proceedings of the convention:—“ I fully agree with you as to the importance of the amendment, adding a senate to the legislative department of the government; its beneficial effects as a check on the rashness of legislation, will be more and more apparent every year. I think it also a good omen of other important amendments in future, especially one in relation to the tenure of judicial office, and another, taking from the legislature the power of appointment, and vesting it in a body less liable to a corrupt and corrupting influence.

Other amendments should be thought of; one constituting a court of chancery distinct from a court of law. I have long since learned in the school of experience, on whose teachings we may with more safety rely than upon the most ingeniously constructed theory, that there are insurmountable objections to our present chancery system, all of which I cannot detail in a letter. The most obvious to all judges, and to all conversant with our judicial proceedings, are, that the judge being compelled at the same term to turn his attention to the trial of issues of fact and issues of law, and to cases in chancery, a versatility of talent is required, which no judge possesses. That the principal business, at every term, is the trial of cases at law, the consequence is that no system of

practice has been settled, and probable never can be settled, to prevent suits in chancery from being passed over and postponed from term to term, occasioning unreasonable delay and ruinous expense to the suitors. I confess I was never able to devise any adequate remedy for these evils under our present chancery system.

Another amendment might be thought of relating to the local affairs and police of the counties, which are now committed to the county courts, with insufficient and not very definite powers. I think this does not well assort with our political institutions. The towns are organized with sufficient powers to manage their own local concerns. A board of supervisors in each county to be elected by the people of the several towns, with sufficient powers to regulate and order the local affairs and interests of the counties, might be very properly interposed between the towns and the general government of the state. It will be seen at a glance, that there are many local concerns of the counties that might be better managed by such a board than by the legislature, and more in consistence with the principles and form of our government than by the county court. It is unnecessary to enter into details. These two amendments are of less importance, because the legislature may erect a court of chancery, and establish a system of police for the counties, under the existing constitution. Yet a court of chancery, and a system of police for the counties should be rendered more stable than they can be by acts of legislation. The two former amendments relating to the tenure of judicial

office, and the power of appointment, are of very great importance, and ought to be kept constantly in view of the people by repeated but calm and candid discussion. Perhaps, if indolence does not prevent, I may hereafter send you some speculations on the subject. But I fear the attention of the people cannot be turned from the interest of party to the interest of the state." He soon after found this to be the case, and paid no further attention to the subject.

On the 20th of December, 1842, he wrote to his correspondent: — "I am glad that you have undertaken an examination of the last article in our constitution, providing for the election of a council of censors, periodically, at the expiration of every term of seven years, vested with certain powers, and among others, that of proposing amendments to the constitution, and calling a convention to act on their specific propositions. As to their censorial powers, I have always considered them a mere nose of wax, and the impropriety, not to say absurdity, of the provision, which compels the representatives of the people, in convention, to work in trammels, confining them to the adoption or rejection of each article proposed, without the least alteration, is very apparent. I wish I could write you more fully on this subject, but I have so nearly lost my eye-sight that writing, as you will perceive by this, has become extremely difficult."

CHAPTER IX.

Elected Chief Justice in October, 1813 — Displaced in 1815 — His Judicial Character.

IN October, 1813, Mr. Chipman was again elected chief justice of the supreme court, and continued in the office until October, 1815, when, by reason of our annual election of the judges, and by a change of parties, he and the associate judges were displaced.

Many of the most important cases decided by the supreme court, while he was chief justice, were reported by him, and some years after, were published in D. Chipman's Reports.

In portraying the character of Nathaniel Chipman, I have already shown that his intellectual and moral qualities peculiarly fitted him for the office of judge. Yet he so nearly realized what he said in a playful manner to his classmate, Mr. Fitch, that he should become the oracle of law to the state of Vermont, it seems proper, and may be useful to state the manner in which he presided as chief justice, and more particularly the causes which operated to render him so distinguished as a judge.

The popularity which he acquired arose from, and followed, the performance of his judicial duties. Such was his manner of presiding, and such his intercourse

with his fellow-citizens, that all classes of men felt quite certain that he never said or did anything for the purpose of acquiring popularity. An eminent jurist remarks — “He never put himself forward as a candidate for office, but when he was advanced to any public station, it seemed to arise from the general sense of the community, that his talents were wanted in the station to which he was advanced. Although on a change of parties, in the year 1813, the federalists had a majority of only one or two in joint ballot, and although party spirit was never more excited or more proscriptive, he was elected chief justice by a majority of seventeen.

“I was in considerable practice during the different times that Nathaniel Chipman was chief justice, and I can truly say, that in times of the greatest party excitement, I never heard an intimation, nor even a whisper, expressing a doubt as to the talents, independence, and impartiality of Judge Chipman. Whenever he presided, he seemed to inspire the profession and the community with the most unlimited confidence. He governed the court with the greatest ease; his presence on the bench appeared sufficient to preserve the most perfect order in court. Every one, both counsel and parties, had the fullest confidence that every case would be decided according to law and the justice of the case, and his decisions seldom failed of giving entire satisfaction to all concerned. He had a peculiar faculty in charging the jury; while he retained all questions of law strictly under the control of the court, he was careful not to intrench on the province of the jury, as to the finding

of the facts in the case. His course was, to give a summary of the testimony of each witness, and instruct the jury as to the point in the case to which each part of the testimony was to be applied. Then to state the situation, circumstances, and manner of testifying of each witness, what circumstances militated against, and what corroborated the testimony, in such a manner as to leave the entire question of fact to the jury; in this manner he seldom failed of leading the jury to a satisfactory verdict. His treatment of the members of the bar was such as to promote in them, high and honorable views of the profession and practice of law. He had a happy talent of adapting the law to the justice of the case, so that it was seldom necessary to apply to the equity side of the court.”¹

At four different times he left his practice, and took a seat upon the bench; and in every case he put off the manner of the advocate, and assumed that of the judge, and, of course, never argued the case in charging the jury; but made a statement of the evidence as above related, with a statement of the principles of law involved in the case. And from his habitual regard for truth, he did it in such manner as to satisfy all who heard him, that it was done with perfect impartiality. He used to remark, that he never dared to argue a case in charging the jury, for if he did, the jury would undertake to argue it also, and in their view, their own arguments would outweigh his. He had such a detestation of fraud or oppression, and even of anything unfair or dishonorable in the party

¹ Hon. Charles Marsh.

or his counsel, that when viewed with his habitual care and caution, the facts appeared clear and undoubted. He was sure to animadvert upon the conduct of the person implicated, in open court, but never with severity in the manner of doing it. All experience has shown that this practice has a very salutary effect on the community. But it is not every judge who can pursue this course, with safety to himself or with any good effect on those who hear him. It is necessary that he have a clear, discriminating mind ; that he be cautious in forming his opinions ; that he be entirely free from all prejudice, and that he be conscious that he is so. Sometimes an unfortunate manner of presiding will prevent a judge from pursuing this course with any good effect — but this is seldom the case ; for if he have every other qualification, his manner will soon be overlooked.

In a certain case before the court, a motion was made for a continuance ; on a hearing, it appeared that the counsel making the motion had resorted to a number of tricks and cunning contrivances to obtain the continuance ; at the close of the arguments, the judge simply remarked, “ It has been said, and all experience has verified the truth of the observation, that there is nothing so silly as cunning — the cause cannot be continued.”

On the trial of an action of ejectment before the court, the plaintiff relied on a deed of the land in question, from the defendant. The defendant’s counsel objected to the admission of the deed in evidence, for that one of the two subscribing witnesses to the deed was the wife of the grantor ; upon which Judge

Chipman addressed the defendant's counsel, saying, "If this is your only defence, your client ought to be advised to make out a new and proper deed without hesitation." Accordingly the defence was at once abandoned.

No popular excitement, no excitement at the bar, could ever disturb him, but he was at all times, and under all circumstances, equally cool, deliberate and patient. It seemed that his mind could never be diverted from the subject under examination. Many causes had operated to produce these qualities both moral and intellectual, which so preëminently qualified him for the performance of his judicial duties. As we have before remarked, he had a most abiding sense of his accountability to the Supreme Being, always insisting that there was no other foundation for moral obligation. A conscientious regard for truth thence resulting, afforded him essential aid in the cultivation of his intellectual faculties; for it is not only an important stimulus in the pursuit of it, but is a protection against false reasoning.

It has been said, that "the study of the dead languages is highly beneficial, as it cultivates a habit of patience, of attention, of acuteness and discrimination." The truth of this is verified as far as it can be verified by one striking instance, in which all those mental qualities and habits have followed an habitual attention to the dead languages. He was shielded against prejudice in making his decisions, as well by his acute and discriminating mind, as by his habitual regard for truth and justice. He so clearly discerned a difference between the right and wrong side of a

cause, and derived so high a degree of pleasure from the investigation of a case, and the formation of a just and satisfactory decision, that he seemed to lose sight of the parties, and everything extraneous. Whereas a judge, who, for want of clear perception, can perceive no distinction between the right and wrong side of a case is influenced in making his decision by the slightest prejudice. True, a man of ordinary powers of mind, if he be undisturbed by his passions, so that he can make the best use of his faculties, and if he have also a strong sense of justice, may become a useful and respectable judge, but he can never be a Mansfield or a Marshall.

We have seen that Judge Chipman was early in life distinguished for his untiring industry in the acquisition of general knowledge. When he entered upon his professional studies, he was equally industrious and equally successful, and his legal learning became deep and extensive. But his attention was not confined to legal science ; it extended to the whole circle of the arts and sciences ; to all the various trades and occupations of men. And many citizens, tradesmen and manufacturers, have expressed their surprise that his knowledge of the various branches of business was so minute, that it seemed to be practical as well as theoretical. President Dwight remarked, that he fell in company with him not many years after he entered upon the business of his profession, and calculating that he would feel more at home in conversing upon legal science, introduced that subject ; but before they parted, he found that his knowledge embraced all the sciences, and that in conversing

upon theology he appeared perfectly at home. This general knowledge which he had acquired was highly useful to him as a jurist. His memory was remarkably retentive. Whenever he acquired a knowledge of important principles, or facts in themselves important, it appeared that they never escaped his recollection, but were laid up in perfect order, always ready for use.

That which he acquired from books he made so perfectly his own, that it appeared not to have been acquired and retained in memory, but to be the result of his own investigations. In conversation upon legal subjects, he seldom referred to authorities, but drew upon his knowledge of the whole system of law; and applied the legal principles to any case with the greatest ease. Yet as a judge, he had such a veneration for that system of jurisprudence which had been settled, and he was so strongly impressed with the necessity of adhering to it as a system, that no judge was ever more careful to adhere to the principles settled by decided cases.

During the time that he was last chief justice, he found that the court had previously put a construction upon certain statutes, which did not accord with his views; yet he felt himself bound by former decisions. In an action of ejectment, one of the parties rested on a title derived from a vendue sale for the collection of a road tax. The opposite party contended that the vendue title was void, the directions of the statute not having been pursued, and cited a case which fully supported his position. The judge, after a careful examination of the statute, re-

marked, "Were it a new case I might take a different view of it, but a judicial construction has been put upon the statute by a prior decision, which ought not to be set aside, especially as it relates to the title of real estate, to alter the law by giving a different construction to the statute, might do the greatest injustice."

Yet if on a careful examination of a decided case, he considered that the settled principles of law had been violated, he did not hesitate to deny its authority as a precedent. In delivering his opinion in the case of *Rhodes v. Peisley*, decided by the supreme court in the year 1791, he denied the authority of the case of *Moses v. McFarlan*, 2 Burr. 1005, going no further into an examination of it than the case under consideration required. He stated and commented upon the case as follows: "Moses indorsed four notes to McFarlan under a special agreement in writing, that McFarlan should indemnify him against all the consequences of such indorsement. McFarlan brought his actions on the several indorsements against Moses before the court of conscience, an inferior court of limited jurisdiction. The court refused to hear evidence of the agreement, and rendered judgment in each of the four cases against Moses. Moses thereupon paid the amount of the judgments, and brought his action for money had and received against McFarlan, to recover back the money which had been so unjustly received, and it was solemnly decided that the action will lie. This is to say, that the indorser is holden, and he is not holden. *The evidence which could not be admitted to save him from an unjust pay-*

ment, could be admitted and was deemed amply sufficient in another action to recover back the identical money." This, it is believed, was the first time that the authority of the case *Moses v. McFarlan* was questioned by any court in Great Britain or in the United States. Four years afterwards, in the year 1795, Lord Chief Justice Eyre, in delivering his opinion in the case of *Phillips v. Hunter*, 2 H. B. 402, commented upon the case, *Moses v. McFarlan*, saying, among other things, "In that case, I think the agreement was a good defence in the court of conscience; but if it were otherwise, the recovery there was a breach of the agreement upon which an action lay, and was, in my judgment, the only remedy. Shall the same judgment create a duty for the recoverer, upon which he may have debt, and a duty against him upon which an action for money had and received will lie?" It is very certain that there could have been no communication between these two judges; this renders the coincidence of thought and reasoning very striking.

CHAPTER X.

Appointed Professor of Law in Middlebury College — Delivered a course of Lectures — His Work on Government — Adventures of his son Edwin — Sickness and Death — Conclusion.

IN the year 1816, Mr. Chipman was appointed professor of law in Middlebury College, and the year following delivered a course of lectures, which attracted considerable attention at the time, but they were never published. Some of these, most interesting to the general reader, will be found in the Appendix, Nos. II. III. IV. and V.

I also find among his papers a manuscript pamphlet, entitled, "Observations on Mr. Calhoun's Exposé of his Nullification Doctrines, containing an account of the origin of the two great political parties, federal and anti-federal, with an impartial history of these parties, and as it also contains a very clear refutation of Mr. Calhoun's arguments or positive assertions, it cannot but be useful. I therefore give it a place in the Appendix, No. VI.

In the year 1833, he published a work on government, entitled, "Principles of Government," a treatise on free institutions, including the constitution of the United States.

From the following preface to the work, the reader will learn the design of the author, and something of the manner in which he has treated the subject.

“The subject of government has employed the pens of the first philosophers of every age, from the time of Plato and Aristotle to the present day. To them the world are much indebted, especially to some of the moderns. None of them, however, as far as recollection serves, have attempted, or at least, have succeeded in an investigation of first principles; in analyzing the social nature of man, and deducing from the relations thence resulting, the principles that ought to be pursued in the formation of civil institutions; and yet it is believed, this is the only certain ground of investigation, the only mode in which any general, consistent, and practical principles in the science of government can be established. The greater number of those who have written on this subject have employed themselves in illustrating and recommending the principles and form of some government, for which they had conceived a predilection; while others, in their theories, have consulted the imagination rather than the understanding. It will, therefore, be readily perceived that the theories and principles of neither class of these writers can be of general, much less of universal application; that they cannot be applied, at least, indiscriminately, to governments of different construction, and embracing different, and, in many respects, opposite principles. Such are the civil and political institutions of these United States; they differ in principles and construction very essentially from all that have preceded them.

The author convinced of that difference of principles and the excellence of our institutions, owing chiefly to that difference, published as early as the year 1793, a small work, entitled, 'Sketches of the Principles of Government; with a view of briefly illustrating the Principles on which they are founded.' That little work, which was well received at the time, has long been out of print.

"The author had entertained a design, as no treatise had appeared fully embracing the subject, of publishing a revised edition of that work; but on a review, he found it too limited in its plan, as well as deficient in arrangement. He therefore resolved to new-cast the whole, to enlarge the plan, to give it a more regular and scientific arrangement, and, as far as he was capable, to make it an elementary treatise on that kind of government which has been adopted in these United States. In the execution of this task, although the work consists principally of new and additional matter, the author has, in several instances, admitted portions of his former work, with such corrections as were suggested by a long course of observations and experience.

"He has enjoyed many advantages favorable to the accomplishment of his design; he has been an attentive observer of passing events, and not unfrequently an actor in the political scenes that have occurred in a period of more than half a century, commencing with the controversy between the states (then colonies,) and the mother country, which eventuated in their independence, and, finally, in the establishment of the present government on the true principles of

freedom — a period agitated and occupied with revolutions and revolutionary movements, which have extended, with various effects, to all the civilized nations of Europe, and the whole of the American continent, and which have produced a more thorough investigation and discussion of the social and individual rights of man, and the nature and principles of free governments, than is to be found in any other age, indeed, than in all preceding ages within the reach of history. With what success the work has been executed must be left to the decision of the public. Such a work adapted to the civil and political institutions of the country has been hitherto a *desideratum*, which it was the author's ambition to supply. If, however, he has failed in this, it will be a sufficient consolation, should what he has attempted excite some writer of more leisure, and of a higher order of talents, to accomplish the task, although now at the advanced age of fourscore, he can hardly expect, personally, to enjoy that consolation.

“The author has, throughout the whole, endeavored at the investigation of natural principles, and to follow truth wherever it led ; he has several times been induced to differ from the opinions of some writers of the first talents and reputation.

“Although he has examined these opinions with the freedom of philosophical discussion, it has been his constant aim to treat the writers with that decent respect which they merit from every lover of science.

“As to the manner and style of the work, if it should be thought that they savor of former times, the apology is, that the author himself more properly belongs to an age that is now past.”

The author has, in a very lucid manner, accomplished what he proposed in the preface. He has analyzed the moral and social nature of man, and thence deduced the principles which lie at the foundation of our free institutions. It seems, therefore, that the work is a proper foundation for instruction in the science of free government.

He had several years before left his practice at the bar, and declined all public business on account of his increased deafness, living in retirement, undisturbed in the exercise of his intellectual powers. I find by his papers, that he had turned his attention to various branches of science, but prepared nothing for publication, except on the science of law and government.

Nathaniel Chipman married Sarah Hill, of Tinmouth, by whom he had five sons and two daughters. His eldest daughter, Laura, married Dr. John Brownson, who settled in Western New York, where he died some years since, and where his widow and children now reside. His youngest daughter, Evelina, is unmarried.

His eldest son, Henry Chipman, was educated at Middlebury College, and maintained a high standing as a scholar. He afterwards studied law with Charles Cotesworth Pinckney, of Charleston, South Carolina, and settled in Waterborough, in that state, in the practice of law, where he married and resided a number of years. At length, being disgusted with slavery, and as his wife, although the daughter of a planter, and accustomed to slavery from her infancy, was desirous to live in a free state, where they should not

be compelled to employ slaves, he moved to Detroit, in the then territory of Michigan. He was soon after appointed a judge of the United States court for that territory, and is now a judge of the municipal court in Detroit. Jeffrey Chipman, his second son, received an academic education, married and settled in Canandaigua, in the state of New York, where he still resides. Edwin Chipman, his third son, studied law with his brother Henry, in South Carolina, was admitted to the bar, and commenced practice in connection with his brother. But he soon relinquished the practice, and undertook to erect mills on a stream in the vicinity of Waterborough. Being nearly destitute of capital, he soon found himself embarrassed with debts, which he was wholly unable to pay. While in this situation he was all at once missing, and under circumstances which rendered it extremely doubtful whether he had absconded, or had been drowned in the stream on which he had been erecting mills. But year after year having passed away, and nothing heard from Edwin, either by his father or any of his relatives, his father became satisfied that he was not living, and gave him up as lost, until October, 1838, when the postmaster in Rutland, Vermont, received the following letter :

Wetumpka, Coosa County, Alabama, August 10, 1838.

SIR, — Not having the pleasure of your acquaintance, or even of knowing your name, I can address you only by your official appellation on a subject which intimately concerns another individual. The object of the application is to obtain precise informa-

tion respecting the Honorable Nathaniel Chipman. As the family was of some distinction, it is probable you can, without much trouble, ascertain their present situation, and where the different members of the family reside, and whatever you may learn interesting to a near relative. It is probable that Judge Chipman and Mrs. Chipman are both numbered with the dead; for, if living, they must have reached a very advanced age. As Judge Chipman once resided in Rutland, and not far from that place when the individual referred to was last heard from, it is probable that a person in your situation may know some member of the family, or give such information as will enable the person interested to correspond with him by letter. By making the necessary inquiries, and communicating the resulting information to me at Wetumpka, Coosa county, Alabama, you will confer a peculiar favor on the individual at whose request I trouble you with this communication.

JOHN R. STEELE.

Postmaster, Rutland, Vermont.

P. S. As I may be from home when your letter shall reach Wetumpka, please direct to John R. Steele, care of Col. Edward Cullen, Wetumpka, *via* Augusta, Georgia, and Montgomery, Alabama.

J. R. STEELE.

The foregoing letter was, by the postmaster, put into the hands of the late Colonel Gove, of Rutland, who, suspecting that it was written by the lost son, Edwin, immediately wrote agreeably to the request of John R. Steele, stating such facts in relation to Judge

Chipman and his family, as then occurred to him. A few days after this, Judge Chipman was at Rutland, and on reading the letter from John R. Steele, was satisfied that Edwin yet lived, and wrote the letter; and immediately wrote to John R. Steele, giving the desired information relating to himself and family; carefully avoiding anything which might disclose the suspicion that he was writing to his son Edwin. This letter, with that written by Colonel Gove, were both delivered, at the same time, by the postmaster, and Edwin wrote an answer to the letter from Colonel Gove, who forwarded it to Judge Chipman, and one week afterwards, and after the high degree of excitement had subsided, which had been produced by the intelligence that his father lived and enjoyed a remarkable degree of health for a man of his age, and by direct intelligence from his loved native village, rendered more dear to him by his long exclusion from it, and by a total want of intelligence from it for so many years, — he wrote the following letter to his father.

Wetumpka, Coosa County, Ala., Oct. 10, 1838.

DEAR FATHER — On the third instant, at the post-office in this place, two letters from Vermont were handed to me, one from yourself, the other from Jesse Gove, Esq., in answer to a letter addressed to the postmaster at Rutland, in the name of John R. Steele. My feelings cannot be described, when at the sight of the superscription of one of the letters, I recognized the hand-writing of my father, who I had believed was not living. Your letter gave me the only intelligence which I have had from any of my relatives, since I

left South Carolina, in 1822. I did, indeed, hear indirectly, that you were about to move to the territory of Michigan. Brother Henry, I knew, had determined on moving to the north, without having, when he left Carolina, on his second northern tour, fixed on any particular location, so that I knew not where to address any individual of my family. Some few years after I left Carolina, I heard that brother Henry was in the practice of law, at Charleston, in company with a Mr. Duncan, and I addressed a letter to him at that place; and receiving no answer, I wrote to the postmaster at Charleston, but he took no notice of the letter. I then wrote to the postmaster at Middlebury, hoping that uncle Daniel Chipman, or some of his family might then reside there, and that through that channel I might be enabled to correspond with some of my own family; but I received no answer to this letter, and all my attempts to open a correspondence with some of my family having proved fruitless, and thinking that in all human probability my parents were not living, I made no further attempts for several years to open a correspondence with them. But at length reflecting that our ancestors were somewhat noted for their longevity, I dwelt upon that fact until it produced a considerable degree of confidence that my parents were still living, and I determined to make one more effort to open a correspondence with them, and I have great reason to be thankful that I have been successful. I presume you know the circumstances under which I left the vicinity of Waterborough, in South Carolina. I started without a cent of money — my horse, saddle

and bridle, and wearing apparel, were my all. I rode seventy-five miles in twenty-four hours. I stopped in Barnwell district, and worked at the blacksmith's trade, as a journeyman, one year. I worked in that district and in Hamburg, and in Augusta, Georgia, about four years. I taught school in Barnwell one year, during which year I married a Miss Thomson, by whom I have had five children, four of whom are living. Soon after my marriage, I removed to Montgomery county, Alabama, and carried on the blacksmith's business, realizing a handsome profit. I also made some money by speculating in prairie lands. But the delicate health of my wife, and several years sickness suffered by myself, compelled me to sell my property to pay my debts. In the year 1836, I left my family in Montgomery county, and went to Coosa county in the Creek country, with a stock of goods to trade with the Indian and white settlers. After a few months the Indians became troublesome, and measures were taken to protect the settlers. The Montgomery regiment was called out, in which I held a commission of lieutenant colonel — and had the command of the forces until the Indians were subdued, when I moved my family to Coosa county, where I now reside. During the last two or three years I have accumulated considerable property, but the money pressure has rendered it difficult to close my business without a sacrifice. Still I hope to get through without much loss. I am at present engaged on the railroad between the Chatahoochy river at West point, and the Alabama at Montgomery, and am located, at

present, near Fort Decatur, on the Talapoosa river, in Macon county.

You say that my dear mother has been dead seven years. My mind has long been prepared for the sad tidings, but the reflection that her days had been embittered by my mysterious absence, and the uncertainty of my fate, has lain heavily on my mind. I will not undertake to describe my sufferings whenever I have realized the intensity of her parental affection, and that her mind was somewhat inclined to melancholy foreboding.

Mr. Gove writes that Dr. Brownson is dead, and that Laura is keeping house with her children in Western New York. Do write particularly respecting all my brothers and sisters and their children, as far as your knowledge of them extends, and remember me affectionately to them all. I have four children living. Theodore, ten years of age; Oscar, eight; Evelina, five, and Edwin Chipman Cullen, aged two years — all healthy and promising. When I left Colleton district, in South Carolina, I adopted the name of Edward Cullen, and am known by no other name in Alabama. The object of adopting that name, and working at the blacksmith's trade, was to prevent the possibility of discovery. No letter can reach me unless directed to that name, Wetumpka, Coosa Co., Alabama. It has always been my intention, as soon as I could acquire the means, to pay off all demands against me, to resume the name of Edwin Chipman by legislative enactment, which would be necessary to legalize my land titles.

Your affectionate son,

EDWARD CULLEN.

Nathaniel Chipman had a strong constitution, and although considerably impaired by an intense application to his studies and a want of exercise during his collegiate course, a more active life in the army restored it. During the whole of his after-life, he was blessed with a vigorous constitution and a continued state of health, interrupted only by occasional attacks of the rheumatism, by which he suffered until about seventy years of age, when, as he remarked, while I was suffering under a severe attack of that complaint, that he had outgrown, or rather outlived his rheumatism, and it might be the case with me. During the remainder of his life he enjoyed a remarkably uniform state of health until his last sickness. On the 13th of February, 1843, he was violently attacked with a congestion and inflammation of the lungs, which put a period to his existence on the fifteenth of the same month, being in the ninety-first year of his age.

Dr. Clarke, the attending physician, remarks, "that he was greatly distressed for breath; the most part of the time unable to speak, and at times appeared to be deprived of his reason; yet, at intervals, when he appeared conscious of his situation, the mind of Judge Chipman showed itself in all its native placidity and calmness."

Having, in the preceding pages, portrayed the character of Nathaniel Chipman as a public man, and in doing so, set forth his qualities, both intellectual and moral, by which he was enabled to fill the various public stations in which he was placed, with so much honor to himself and usefulness to his coun-

try, I shall conclude with a few brief remarks respecting his temper and disposition, which contributed so much to his happiness through a long life. His passions were naturally strong, as is too often the case with men of a high order of intellect, but very early in life he so perfectly subdued them, that they never thereafter gave him the least disturbance. He was never known to harbor a spirit of revenge or ill-will against any human being. He used to remark that it was very singular that so small a portion of men could ever learn that a spirit of revenge and hatred of others, only rendered themselves unhappy. The goodness of the Creator, he said, was most clearly manifest, by his having so constituted man that he was not necessarily made unhappy by the enmity of others. Were it so his happiness would depend not on his own good disposition, but on the disposition of others, over which he has no control. But the benevolent Creator has placed it in the power of each individual to cherish feelings of benevolence and good-will towards even his enemies, and so never be rendered unhappy by their enmity. Although most distinguished for his intellectual powers, and the fund of general knowledge which he had acquired, yet he had also a vein of wit and humor, which rendered him a pleasant as well as instructive companion. He was also a man of very tender feelings, and deeply sympathized with the afflicted. In answer to a letter which I wrote him in October, 1840, giving him information of the loss of our daughter Mary, he wrote, "We had been informed by Susan Stowell, who was here on a visit last week, of the death of your daughter Mary. In this

affliction I sincerely sympathize with you and her mother. I have, in the course of my life, lost three children, but all in infancy. I feel that this is very different from the loss of a child in the bloom of life, and the subject of a long and cherished affection. I was much concerned for the effect that this sudden loss might have on you, as well as her mother, in your feeble state of health, but am happy to learn that you endure the affliction with a becoming degree of fortitude and resignation."

In answer to a letter which I wrote him in March, 1841, giving an account of the death of our eldest daughter, Mrs. Linsley, he wrote, — "I received your account of the loss of a second beloved daughter, in the course of a few months, with deep sympathy. I feel it not the less sensibly from a recent dispensation of Providence, in my own family. I had just received information of the death of my son Edwin, so long lost, and lately found — as it were, restored from the dead. I had been induced to believe that he was no longer living from his long silence, having received no answer to three letters which I had written him since September, 1839. About the first of last month I received information from a gentleman who lived not far from Edwin's residence, that he came to his death about fourteen months before, being caught and instantly killed by a machine which he had invented, and with which he was levelling timbers on a railroad. Though the event was expected, the unexpected manner of his death gave poignancy to the effect on my mind. But I have long since learned to submit without a murmur to the dispensations of Providence, be-

lieving that they are all in mercy, however it may seem to us in the moment of bereavement." This was not with a mere compliance with customary forms — possibly he too often disregarded customary forms — but it was written from a most abiding sense of a superintending Providence, and of his accountability for all his thoughts and all his actions, and as he habitually pursued the dictates of an enlightened conscience he never had occasion to conceal his sentiments — he never learned how to put on any disguise, but always expressed his sentiments openly and frankly. How different from many of the present political generation !

No. 1.

A DISSERTATION

ON THE ACT

ADOPTING THE COMMON AND STATUTE LAWS

OF ENGLAND.

DISSERTATION.

THE reasons for passing this act are contained in the following preamble.

“Whereas it is impossible, at once, to provide particular statutes, applicable to all cases wherein law may be necessary for the happy government of this people: And whereas the inhabitants of this state have been habituated to conform their manners to the English laws, and hold their real estates by English tenures.”

By the first section it is enacted, “That so much of the common law of England as is not repugnant to the constitution, or to any act of the legislature of this state, be, and is hereby adopted, and shall be, and continue to be, law within this state.”

By the common law of England, exclusive of positive laws enacted by statute, are understood those rules and maxims, by which decisions are made in their courts of law, whether in relation to the mode of prosecuting a right, or to the right itself—rules and maxims, which have been there adopted, “time whereof the memory of man runneth not to the contrary.” For a knowledge of the common law of

England we must have recourse to the history of their law proceedings, handed down in almost innumerable volumes of reports, and to the writings of the sages of their law.

The foregoing statute, adopting the common law of England, in this state has rendered a knowledge of that law indispensable in our courts. This statute expressly limits the adoption of the common law, to so much as is not repugnant to the constitution, or any act of the legislature of this state. By this limitation, all that part of the common law, which relates to the royal person, family, and prerogative; all which relates to the peerage, their privileges and preëminence, is excluded. We have, strictly speaking, no common law officers; all the offices in this state are established, and the duties, in general terms, pointed out by the constitution, or by statute. The terms and expressions, adopted in both, are frequently derived from the common law. The office of sheriff, for instance, is contemplated in the constitution, and established by statute. His power and duties are pointed out, generally by statute: these are, mostly, the same as those of a sheriff in England; yet these powers and duties are derived from the constitution and statutes of this state, and, limited by them, the manner in which these shall be exercised, if not pointed out by our laws, must be learned from the common law of England, so far as adopted here; as, the manner of an arrest — what shall be deemed an escape.

From the different constitution of our courts, the English mode of practice can, in very few instances be adopted; but their rules may, in most instances, be applied in determinations on pleas and pleadings; in the construction of

words and of laws; in almost every instance, which can arise in our state of society, between individuals, on torts, frauds, or contracts.

It will be much more restricted in cases arising on our landed titles. Many of those titles were derived from the king of Great Britain, and many conveyances made, while under British laws and government. Their validity and operation must be decided by the laws under which they were derived and made. But our landed property has suffered a great alteration by the revolution. It has been changed in the hands of the owners, from estates in fee, into allodial estates, holden no longer even in idea of a superior.

The mode of descent, and right of inheritance, depend entirely on our statutes; while the degrees of affinity and consanguinity are to be learned from the common laws of England. The whole chapter of entails is abridged — perhaps expunged — in a word all the consequences of the feudal tenure are abolished — a tenure once very general in Great Britain, the traces of which are still visible in all their laws relative to landed property, and which introduced rules and maxims, full of absurdity and oppression — rules and maxims which there still operate, more or less, although the reason of their introduction has long ceased. That part of the common law, which arose from the adoption of the canon law, has shared the same fate.

I have given these instances by way of example only. It is not my design to enumerate every instance, in which the common law of England is to be applied in this state, or in which it is excluded or restricted. It will be of more use

to discover some general principles, which may enable us to distinguish properly in our applications.

The common law of England is a system of rules, supported by precedents, handed down from remote antiquity. These precedents have, by the body of the law, as is common enough with professional men, been held in too great veneration.

A number of precedents, in point, however obscure or uncertain the principles upon which they were founded, have been held fully decisive of a similar question ; and yet many of these precedents were made at a time, when the state of society and property were very different from what they are at present ; in an age when the minds of men were fettered in forms ; when forms were held to be substances, and abstractions real entities. Technical reasoning and unmeaning maxims, of course, frequently supplied the place of principles.¹

¹ “ *Solvatur eo ligamine, quo ligatur,*” literally, “ Let it be loosened by the same tie by which it is bound.” This pompous, unmeaning maxim was introduced from the civil law. Tying and untying, binding and loosing, are different operations, connected only by the subject, and may be performed by different means and different powers. There is no kind of similarity between them. By a forced application of this unmeaning maxim, many an obligor has been condemned to a second discharge of his obligation, although able to make indubitable proof of a former discharge, differing from his contract only, in some immaterial circumstance, to the full acceptance of the obligee ; and this because he could not make his proof by an instrument of the same kind with that by which he was bound. Lord Kames has somewhere nearly the same observations.

Let me here add an instance of a different kind. The whale was a royal fish. The head was allotted to the king ; the tail to the queen. *Lex est summa ratio.* Law is the perfection of reason. A reason must be given for this allotment. Say the ancient lawyers with much gravity,

Society was in a state of melioration. Manners and sentiment progressed towards refinement. Intercourse between individuals, as well as nations began to be extended, and in same measure, secured the rights of property, and the rights of commerce were investigated, and better understood.

The clouds which had long hung over the reasoning faculties, began to be dispersed ; principles were examined and better established. *Cessante ratione, cessat et ipsa lex*. When the reason of a law ceases, the law itself ceases, was adopted as a maxim of the common law ; for in those times, nothing could be decided or altered, without a precedent or a maxim. By the application of this maxim some precedents which were originally absurd, and some which had become inapplicable, through a change of times and circumstances, were set aside. The progress, however, was slow. Men correct or give up with reluctance those things which have cost much pains in learning. Many such precedents had, however, become a rule of property. These could not be shaken by the judges, without the greatest injustice to individuals.

Upon rules and precedents, Judge Blackstone has the following observations : " Not that the particular reason of every rule in the law can, at this distance of time, be always precisely assigned ; but it is sufficient that there is nothing in the rule flatly contradictory to reason ; and the law presumes it well founded." And again, " Precedents are to be followed, unless flatly absurd, or unjust : for though their

"The tail was given to the queen to furnish her wardrobe with whalebone ;" but for this, as whalebone is found only in the mouth of that fish, she must have been still beholden to the king.

reason be not obvious at first view, yet we owe such a deference to former times, as not to suppose they acted wholly without consideration." This might perhaps be well enough in England. But the principal reasons, there, for so strict an observance of precedents, are that the rules of law may, from their permanent uniformity, be the better known; and lest by too easy a departure, judges might unwarily disturb rights, or property acquired, transmitted or holden on the faith of such precedents. If no reason can be assigned, in support of rules or precedents, not already adopted in practice, to adopt such rules is certainly contrary to the principles of our government, and the spirit of our laws, which admit not of arbitrary rules, or of arbitrary decisions, even in matters indifferent.

We can readily suppose that former ages did not act without consideration; we can believe them to have acted upon principles and reasons, which arose out of their state of society; but it would be too great a deference to concede to them, who are now no way interested in the concession, or affected by it, the principles and reasons, which arise out of the present state. It is much more just to them, and to ourselves to suppose, that good reasons, there, existed, which from a change of circumstances have long since ceased.¹

¹ Determinations of law, though they cannot always go the full extent, ought never to stand opposed to the nicest sense of moral obligation, to the principles of the government, or what ought to be the spirit of its laws. In adjusting these, we should act more wisely, if instead of entertaining a blind veneration for ancient rules, maxims and precedents, we could learn to distinguish between those which are founded on the principles of human nature in society, which are permanent and universal,

It was a rule, that if a statute be made, altering the common law, and a statute come after, repealing the former statute, the common law revives. But it ought to be understood with this limitation, if the common law be founded on principles still existing in the present course of justice.

Legal right and wrong, particularly in criminal jurisprudence, have an intimate relation to the constitution, principles, and circumstances of the government. There will be a coincidence between the principles of the government, the spirit of its criminal law, and the mode of interpretation and execution.

The British government, which has ever been a mixture of monarchy, aristocracy, and democracy, has principles peculiar to that government. The monarchical principles have a silent, but uniform influence on their criminal jurisprudence.¹

and those which are dictated by the circumstances, policy, manners, morals and religion of the age.

¹ Many instances might be given of the influence of feudal, monarchical, and aristocratical principles on the decisions of the English law. The following are selected as examples.

Homicide per infortunium; or the killing of a man by misadventure, is held to be a crime. The manslayer is indeed pardoned of course; but he forfeits his goods to the king; because, says the law, the king has lost a subject. This is evidently of feudal original. The forfeiture was at first intended as a reparation to the king for the loss of a vassal.

The absurd doctrine of deodands, which still disgraces the English laws, was derived from the superstition of the times; but is now considered as a prerogative right.

By attainder, the blood of the person attainted is supposed to be corrupted, and to have lost every inheritable quality. The king may pardon the person attainted, and make him a new man, but cannot restore his former inheritable connections, or prevent an escheat to the lord.

A son born before the attainder shall never inherit to this new man;

At the time when the common law was growing into a system by means of precedents, the judges were solely dependent on the crown. Monarchy procures obedience no less by fear than by the principle of honor. The highest orders in the government, and the most aspiring characters, are influenced by the prospect of attaining honors. The multitude are restrained by fear. The manners of people are rough, and little short of savage. From all these circumstances their punishments become, in many instances, shockingly severe. Whether it be owing to the force of habit, to the influence of the monarchical and aristocratical principles in their government, or both, modern refinement of manners, modern delicacy of sentiment, has prevailed very little to soften that severity. Their laws, like those of Draco, may emphatically be said *to be written in blood*. They have about one hundred and fifty capital offences. These are, mostly, created or confirmed by statute ; but some are still crimes at common law only.

The government of this state is that of a democratic republic. The principle of this government, by some called virtue, is a sentiment of attachment to its constitution and laws. This principle dictates moderation in the enacting, in the interpretation and execution of its laws. Here there

his after acquisitions shall rather escheat. An after-born son may inherit ; but not if there be any former son living, or heir of such son.

The following rule, which was adopted in a matter of mere civil right, is of the same feudal origin.

The brother of the half-blood shall never inherit to the brother of the whole blood. The fee shall rather escheat to the lord ; because, by the feudal constitution, the descent is confined to the whole blood of the first feudatory.

is, perhaps, some danger, lest, through the influence of precedents, the courts should deviate from the spirit of moderation, the true spirit of our laws. I should lay it down as an unalterable rule, that no court in this state ought ever to pronounce sentence of death upon the authority of a common law precedent, without the express authority of a statute. "All fines," says the constitution, "shall be proportioned to the offences." This is not to be understood of pecuniary mulcts only. The word *fines* is here to be taken as synonymous to punishments. Taken in this large sense, the clause is consonant to the principles and spirit of our government and laws.

Actions which are criminal of England may not be so in Vermont. Civil crimes become such by a certain relation to the society where they are committed.

From the difference of the relation in different societies, the same action may be either not criminal at all, or criminal in a different degree. Here, *cessante ratione, cessat et ipsa lex*, ought to be applied, whether to determine an action not to be criminal, or to be criminal in a less degree. Nay, the principles of the common law, which are the true principles of right, so far as discoverable, are competent to decide on the criminality of an action, which shall be notoriously and flagrantly injurious to society in this state ; although such an action had never been done, or even heard of in England ; and to declare a punishment, but short of death.

Lord Mansfield was powerfully attached to the monarchical and aristocratical principles of the British government. Whenever these intervened in a cause, they had great influence on his reasonings. In other questions merely of a civil

nature, he was a great and a good judge. No judge, perhaps, in that country, ever had a more thorough knowledge, both of the principles and precedents of the common law. His judicial opinion may be considered as a common law precedent in the construction of this statute. "The law of England" says he, "would be an absurd science indeed, were it founded upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty, but the law of England, exclusive of positive law, enacted by statute, depends upon principles; and these principles run through all the cases, according as they fall in with the one or the other of them."

We may then lay it down, that this statute gives the citizens of this state the rules, maxims, and precedents of the common law, so far as they serve to illustrate principles — principles only, which, from the situation of society with us, exist in this state; but does not impose upon them those principles which, from the particular circumstances of that government, exists only in England.

The act goes on to recite that, "Whereas the statute law of England is so connected and interwoven with the common law, that our jurisprudence would be incomplete without it; therefore it is enacted, that such statute laws, and parts of laws of the kingdom of England and Great Britain, as were passed before the first day of October, A. D. 1760, for the explanation of the common law, and which are not repugnant to the constitution, or some act of the legislature, and are applicable to the circumstances of the state, are hereby adopted and made, and shall be, and continue to be, law within this state, and all courts are to take notice thereof and govern themselves accordingly."

In this section, the words "and are applicable to the circumstances of the state" render any comment unnecessary. Indeed, though these words are not expressed in the former section *tamen tacite infunt*, they are contained in sense.

No. II.

OF LAW IN GENERAL.

LECTURE I.

LECTURE FIRST.

IN entering upon a course of legal instruction, it will be proper to take a general view of the origin and nature of law, as well as to define the limits within which we are to proceed.

Judge Blackstone tells us that, "law in its most general comprehensive sense, signifies a rule of action; and is applied indiscriminately to all action, whether animate or inanimate, rational or irrational." Such is the sense which general custom has annexed to the term. Thus when we speak of the laws of nature in reference to the system of the universe that comes under our knowledge, we mean those laws by which all its motions and operations in all its parts are produced and directed in an unceasing series, regular, orderly, and uniform. In these laws of nature we comprehend not only those laws, which govern mere brute matters, whether organized or unorganized, animate or inanimate, but those moral laws which govern the actions of man as an intelligent being. Between the former and the latter there is, however, an important distinction. In the former, whether we suppose with some that the Creator in the formation of the universe,

impressed on matter certain principles, from which it cannot depart, without ceasing to exist, or with others, that according to a predetermined plan, the movements of the whole system and every operation, even to the most minute in the physical world, are carried on by an immediate exertion of the Divine agency; yet here the law as it respects the subjects, is a law not of obligation, but of necessity. The subjects are mere passive instruments, without consciousness, will, intention, or power of resistance. No moral consequences are attached. But the latter, the law of intelligent being, by which I mean the law of human actions, is a law of obligation, not of necessity; not physical, but moral. Man has indeed a body consisting of matter, wonderfully organized, and endued with animal life. Considered as an animal, he is subject to the physical laws of which we have been speaking; but he is also furnished with mind, with intelligence, with a faculty by which to attain the perception of moral relations, in which he finds himself placed; he is conscious of an obligation, or perhaps we shall be as distinctly understood if we say, he intuitively perceives an obligation to perform a certain act, or to pursue a certain course of action. This, which we may call a moral perception, is found to be common to the whole human race, although more or less clear; more or less comprehensive in different men, according to their different susceptibilities, and opportunities of improvement. Hence is derived the general notion of a moral law, which, by way of eminence, is called natural law, or the law of nature. But this is not all which goes to constitute the binding force of a law. There is further associated the notion of a Supreme Power, rightfully ordaining

the law, and requiring its observance. Without this I cannot conceive how the obligation can exist. There might arise a question of utility, but I do not perceive how a question of duty can be raised. In the cause of natural law, that Supreme power is perceived, and acknowledged to be the great Creator of the universe, who made man, and established him in a situation to sustain those relations, individual and social, from which his duties result, and which point out to him the moral laws of his nature. This view of the subject suggests the propriety of an observation of Mr. Christian, the learned annotator of the Commentaries, that law, in its strict sense, is applicable only to human conduct, or at least to the conduct of subordinate intelligences. Every other application is metaphorical. In all cases in physics, with strict propriety, for law, might be substituted *quality*, property, or peculiarity. We sometimes speak of the laws of Deity, but certainly in a sense very different from that in which it is applied to man, or any of his other creatures. When we say that the Deity carries on his operations by certain laws, we mean this only, that they are carried on with wisdom, regularity, and order, consummate and undeviating. His will only can be his law. The idea of a superior ordaining the law and requiring obedience, cannot be here admitted without obscurity and even impiety. With as little propriety can we admit of the phrase when we apply the word law to the operations of nature, or to the works of art, as when we speak of the laws of vegetation, of attraction, of mechanism, we certainly include the idea of a superior Power, who has established the principles of operation in each case, through a constant and regular chain of

causes and effects, to the attainment of the end ; but here we are forced, instead of obligation and obedience, which includes volition, to admit necessity ; and to exclude the ideas essential when we use law as applicable to man, of disobedience and punishment. That the creature is necessarily subject to the Creator ; that all created intelligences endowed as man is, with free will, are under the most perfect obligation to obey the will of the Creator, upon whom they are absolutely dependent, is an intuitive truth, a subject of direct perception to every moral being capable of understanding the proposition. It is a *first* principle in *Ethics*, and, like every other first principle, is not left to be discovered by any mere process of reasoning. The great business of reason is to assist and direct in the application of the principle to human conduct. The will of the Creator is in like manner discovered in those relations which he was pleased to establish in the moral system of man, by an intuitive perception of their result in moral obligation, the duty of obedience. The Divine will cannot be supposed for an instant without a reference to these relations ; much less can it ever be supposed to stand in opposition to them, or to reverse the result.

We ought here to take notice of an inaccuracy of Judge Blackstone's. He has said that "God has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised, but has graciously reduced the rule of obedience to one paternal precept, 'That man should pursue his own true and substantial happiness.'" This, taken in the sense of the author, is, it appears to me, inaccurate at least.

discovers to man more clearly his relation to his Maker, and the duties thence arising; opening to him the certain view of an eternal existence beyond the present state; and pointing out the means of securing his happiness throughout that existence; not only consistent with, but promotive of his happiness here; it offers considerations which must somewhat affect what we have called the original laws of nature — considerations which ought to enter into every combination of moral relations, and proportionally to influence the duties thence resulting.

Thus explained, the laws of nature are the only true foundation of all human laws. Judge Blackstone asserts the same thing, and that no human laws should be suffered to contradict these laws of nature; and then adds, by way of explanation, or rather by way of exception to the first general proposition, “There are, it is true, a great number of indifferent points, in which, both the divine law and the natural leave man at his own liberty, but “which are found necessary to be restrained within certain limits.”

Further on, he observes, in effect, that in those matters which he calls indifferent, human legislators have scope and opportunity to interpose, and to make that unlawful which was before lawful; and in treating of the obligation of positive laws, he considers those which are made concerning these indifferent matters, as he calls them, as inducing no moral obligation to the observance. His words are, “In regard to those laws that enjoin only positive duties, and forbid only such things which are not *mala in se*, but *mala prohibita* merely, annexing a penalty for the non-compliance, here, I apprehend, conscience is no further concerned,

There may be, and sometimes is, a complexity in the relations, a difficulty in arranging them, and giving to each its due weight and importance in the association. When the arrangement is properly made, the result is clear, the perception of what is duty in the case is intuitive, without any reference to the supposed fitness or unfitness of things. But that man should pursue his true and substantial happiness, cannot with propriety be called a rule or precept. Man's happiness is the great end proposed by all the precepts, the sure end to be obtained by obedience. To call it a precept, is therefore to confound the law with the end sought to be effected by the law.

In the view which we have taken of the subject, the law of nature has its foundation in the will of God. It is his will manifested to man in his works, and is, as Judge Blackstone justly observes, "binding over all the globe, in all countries, and at all times. No human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, all their authority from this original."

We must not here omit the law of revelation. From the imperfection of human reason, and the moral powers of man, he is necessarily subjected to imperfect views and erroneous conceptions. God has therefore been pleased, by an immediate revelation, to discover to man those laws and these duties, a knowledge of which he could not at all, or but imperfectly, attain by unassisted reason; and, although it has been justly observed that the laws of revelation are found, on comparison, to be a part of the original laws of nature, tending, in all their consequences, to the felicity of man, yet it ought to be added that, as revelation

than by directing a submission to the penalty, in case of a breach of those laws." With all the deference due to the author of the *Commentaries*, as a luminous, and, with few exceptions indeed, a correct law writer, I am persuaded that the doctrine here advanced is erroneous, and dangerous to be admitted into society. On a little examination it will clearly appear, that every law, necessary for the good of the state,—and such are the laws of which the author was speaking,—is morally binding upon every member of the community. The error seems to have arisen, at least in part, from an opinion adopted by many, and which, though not admitted by the author himself, seems to have influenced his reasonings, that a state of individual independence is the only true state of nature to man—that every advance, every social improvement, is a departure from his nature—and that, in an advanced state of society, in civil government, it often becomes necessary, and even right and proper, to make many laws for the good of the state, which, though not contrary to the great original law of nature, have not the sanction of that law; and, though politically binding, are not morally so, their observance or violation does not affect the conscience. A little consideration will evince the unsoundness of this opinion, and all the consequences supposed to be derived from it.

There is by nature implanted in man a capacity for improvement. He is a social being, formed by nature for society. A state of nature may be a state of weakness and ignorance; but a state of knowledge and improvement is not therefore, with man, opposed to a state of nature. As well might we make the assertion of the infant and the

adult. An endeavor after knowledge, and the improvement of his powers, social and individual, is indicated to man, nay, is imposed upon him as a duty by the very laws of his nature. That rude independence, so often imagined, is a state forced and unnatural. It cannot exist without a violation or a dereliction of almost all the laws constituted by God in the formation of man. The isolated individual is deprived of almost all the laws of his nature; scarcely have any of his powers, his mental faculties, passions or appetites, either excitement or object. He *may* be freed from some of the evils and vices found in society, but he is also excluded from all its endearing charities, all its enjoyments; in a word, he is hardly entitled to the rank of man. He is in possession of himself, and entitled fully to his *rank* in society only. It is a state to which all his powers and faculties are adapted, to which the laws of his nature bind him, and which gives him the full privilege of those laws. Civil government is the necessary and natural consequence of a state of society, as we shall have occasion to explain more fully hereafter, and is legitimately founded in the principles arising out of the social nature of man, or, in other words, in the laws of nature. All the members of the society have in it a common interest. This consists in the means of securing to all, and adjusting their social and individual rights. To effect this *end*, laws to regulate the conduct of the members, and direct it to the great object of the society, the common good, are indispensably necessary. A power must therefore be somewhere lodged, to make and enforce the observance of such laws. The mode of constituting this power must always be left to the wisdom of

man, and will vary more or less, according to the wisdom, integrity, and means employed to effect the end ; but the constitution of such a power is founded in the laws of social nature. Surely, then, every law made in the spirit of such constitution, whether it relate to the security of individuals, to the security and improvement of social intercourse, internal or external, or to the support and maintenance of the state, is ultimately derived from the laws of nature, and carries with it the force of moral obligation. It is true, that when a certain end is to be effected by a law to be made, several objects may offer, and it may be a matter of indifference, or rather of deliberation, on which the choice shall fall ; but when the choice is made and the law enacted, that indifference is not transferred to the law to weaken the obligation to obedience.

As to there being matters indifferent, which it is, nevertheless, " necessary to sustain by law," it appears to be little if anything short of a plain contradiction. It is true that, in certain stages of society, some acts may not be injurious, but may be even beneficial to the community, and very justly permitted to individuals, which, in a progressive change of circumstances, become highly injurious ; so that a law to restrain these acts will have become right and fit, or, to express it in the manner of our author, absolutely necessary to the good of the whole. Surely, if the requisitions of the law be right and fit, it is right and fit that it should be obeyed. The duty of obedience is not a vague, political, but a strict, moral obligation.

The cases in which the author of the Commentaries, as well as others, have advocated this laxity of principle, are

generally of laws regulating commercial intercourse, or for raising a revenue to the state. The learned annotator, Mr. Christian, whose opinion I am happy to find coinciding with that which I had long entertained, has illustrated this point in a brief but masterly manner. I shall conclude this part of the subject with a passage from his notes. After having taken notice of certain laws made to prevent the destructive effects of fire in London, and the quarantine laws, made to guard against the importation of infectious diseases, he proceeds :

“ He who, by a breach of these positive laws, introduces conflagration and pestilence, is surely guilty of a much greater crime than he who deprives another of his purse or his horse.” “ The laws against smuggling are entirely *juris positivi* ; but the criminality can only be measured by the consequences ; and he who seizes a sum of money by evading the public tax, does exactly the same injury to society as he who steals so much money from the treasury ; and is therefore guilty of as great immorality, or as great an act of dishonesty. Or smuggling has been compared to that species of fraud, which a man would practise who should join with his friends in ordering a dinner at a tavern, and after the festivity and gratifications of the day, should steal away, and leave his companions to pay his share of the reckoning. Usury and simony are entirely of a positive nature, yet few men would have a conscience quite at ease who had been guilty of either.”

Punishments or penalties are never intended as an equivalent or a composition for the commission of the offence ; but they are that degree of pain or inconvenience, which are sup-

posed to be sufficient to deter men from introducing that greater degree of inconvenience which would result to the community from the general permission of that act which the law prohibits. It is no recompense to a man's country for the consequences of an illegal act that he should afterwards be whipped, or should stand in the pillory, or lie in a jail. But in positive laws, as in morals, it is equally false that *omnia peccata paria sunt*. If there are laws, such perhaps as the game laws, which, in the public opinion, produce but little benefit, or *no* salutary effect to society, a conscientious man will feel perhaps no further regard for the observance of them, than from the consideration, that his example may encourage others to violate those laws which are more highly beneficial to the community. Indeed, the last sentence of the learned Judge upon this subject, ("that where disobedience to the law involves also any degree of public mischief, it is also an offence against conscience,") is an answer to his own doctrine ; for the disobedience of any law in existence, must be presumed to involve in it either public mischief or private injury. It is related of Socrates that he made a promise with himself to observe the laws of his country ; but this is nothing more than every good man ought to promise and to perform ; and he ought to promise still further, that he will exert all his powers to compel others to obey them. As the chief design of establishing government is the prevention of crimes, and the enforcement of the moral duties of man, obedience to that government becomes one of the highest moral obligations ; and the principles of moral and positive laws being precisely the same, they become so blended that the discrimination

between them is frequently difficult or impracticable, or, as the author of the "Doctor and Student" has expressed it with beautiful simplicity, "In every law positive, well made, is somewhat of the law of reason and of the law of God; and to discern the law of God and the law of reason from the law positive, is very hard."

Having premised these observations on the origin and nature of laws in general, pointed out the foundation of all laws, and the sources whence their obligation is derived, I shall hereafter take a brief notice of the law of nations; explain the general nature of municipal laws; and then proceed to a systematic investigation and explanation of the common law of England, which is to be the principal subject of the intended course. We shall dwell, however, more particularly on those parts of the common law which are in force in this country, and the rules, reasons and principles, by which our judicial decisions are governed in all cases where the constitution or positive laws have not been interposed to supersede or alter them. Other parts will meet with attention so far, and so far only, as shall be found necessary and proper for elucidation, and to show the connection of the system.

No. III.

OF

NATIONAL LAW, AND MUNICIPAL LAW IN GENERAL.

LECTURE II.

LECTURE SECOND.

It was on a former occasion observed, that in the supposed state of nature, which is made to consist in individual independence, the laws of nature are almost wholly excluded. In such a solitary state, the laws of morality, which teach the duty towards our fellow-men, the social duties which result from such relations only, can have no place. Such a state is merely imaginary. A man may tear himself from society; he may place himself in a total seclusion from all others; but whenever and wherever he is placed with man, social relations arise, and social duties result from the laws of his nature, independent of his volition or choice. These duties, by forming connections and relations more or less intimate, he may vary, contract, or extend within certain limits, but he cannot abrogate law, or weaken its obligation. A state of society may indeed be supposed, and has actually existed, previous to regular political institutions, or any adopted form of civil government. In such a state the natural law of morals can be the only law which is prescribed, and can be enforced only by the collective sense and natural authority of the wise and good,

and will frequently assume the shape of compact and agreement, rather than of civil laws, the organs of legislative and executive power being wanting.

Mankind, dispersed over the earth, could not unite in one society. Local and other circumstances have occasioned a division into separate states and nations, independent of each other, without that intimate, united bond of common interest, in which the individuality of a state or nation consists. Between independent nations various circumstances of necessity or convenience induce international communications, an intercourse more or less frequent and intimate. Among independent nations, from the very nature of their situation, no common superior power to dictate and enforce the law can be admitted. In this respect, the great society of nations, as we may call them, resembles, in no inconsiderable degree, the state of society just described, as existing before the actual organization of civil government. The law of nature, which in this application of it is called the law of nations, is therefore the only law; for although they may enter into the most solemn treaties and conventions for regulating intercourse, and adjusting mutual concerns and interests, yet is each nation bound to the observance of treaties and conventions, by mutual law only. Each must depend on the faith of the other, and in case of violation must submit, or resort to the law of force. Such is the foundation of international law, which in the Institutes of Justinian is thus defined: "*Quod naturalis ratio inter omnes homines constituit, id apud omnes gentes peræque custoditur; vocaturque jus gentium, quasi quo jure omnes gentes utuntur*" — "That law which natural reason

appoints for all mankind, is called the law of nations, because all nations make use of it." We are not, however, to suppose this law always to have been dictated by pure reason, deliberately deciding what is right and fit, but by reason influenced, controlled, and directed by the prevailing manners, knowledge, interests, and pursuits of the age. In short, every claim to its observance has been made to depend rather on long established usage, than any original dictates of right reason.

Accordingly, we find that international law has always partaken of the barbarity of the age, and has been improved and refined with the improvements and refinements which have taken place in the knowledge and manners of nations—greatly retarded, however, by the force of custom. It will be sufficient at present to mention one instance in the laws of war. Among the barbarous nations of antiquity, and this comprehends every nation whose history is extant, the laws of war acknowledged no right but that of the strongest.

These laws universally subjected in full right to the conqueror, the life, liberty, and property of the conquered. To grant to a captive enemy, or to the people of a conquered country, their lives, in exchange for perpetual servitude for themselves and posterity, or the payment of a perpetual tribute, was considered as a humane indulgence—a relaxation of the strict right of the conqueror. Such continues to be the acknowledged law of nations throughout Africa, and no small portion of Asia. The same law is admitted, and carried into execution with augmented severity by the aboriginal nations and tribes on this continent.

But among the nations of modern Europe, and their de-

scendants in other parts of the globe, improvements in liberal science, and refinements in manners and morals, under the benign influence of the Christian religion, have banished this reproach from their code of international law.

With these brief notices of the law of nations, I shall pass on to the municipal law; some explanation of which is a necessary preliminary to the study of the common law.

Municipal and civil law, when used generally, are terms of the same import, meaning the rules or laws by which any particular state or nation is governed, as the municipal law of England, of France, or any other nation. When the civil law is mentioned by way of eminence, it is applied exclusively to the code of Roman law — that which was once the municipal law of ancient Rome, or rather of the Roman empire. Municipal law under the name of *jus civile*, or civil law, is thus defined by Justinian. “*Quod quisque populus sibi jus constituit, id ipsius proprium civitatis est, et vocatur jus civile quasi proprium ipse civitatis.*” That law which a people institutes for its own government, is called the civil law of that people. This comprehends, not only the positive laws expressly enacted by the legislative power, but all customs which have obtained the force of general laws in the state.

Judge Blackstone has given a more particular and more scientific definition of municipal law. He tells us that it is a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong. Let us now, with the author of the Commentaries, endeavor, as concisely as possible, without losing sight of perspicuity, to illustrate the several parts of the definition.

First, then, municipal law is a rule. It differs from a mere order given by a superior to an inferior, which is confined to the person or the occasion. It differs from an act granting property, or a privilege, or exemption to an individual, or enacting a penalty upon a particular person. For although these assume the name and shape of laws, and though they may have permanency, yet they want that universality which is essential to a rule, in the sense of municipal law. Such are usually called private acts, and may, with the strictest propriety, be called grants, compacts, or sentences, according to the subject and the parties. Not that it is necessary that the rule or law should operate simultaneously or immediately upon all the members of the community. It is sufficient that it have a potential operation upon all, that its scope and tendency is to secure the rights of the citizens, to secure an impartial administration of justice, or in any legitimate way to promote the general interests, although in its immediate requisitions, it shall extend only to a certain class or certain classes of men in the state. Thus an act requiring all persons, accepting any public office, to take an oath for the faithful performance of its duties, in its immediate requisitions, extends only to those persons who shall, from time to time, be appointed to such office ; yet it is with propriety deemed a general or universal law, not so much because appointments are supposed to be open to all, so that all may become subject to its immediate operation, for in all governments there are qualifications for office, and exclusions, particularly that of one of the sexes generally, but because to secure a faithful performance of the duties of public functionaries, the great object of the law, concerns the community universally.

The law is distinguished from advice or counsel, for that it imposes an obligation, and compels even the unwilling. Whereas advice or counsel is received or rejected, at the option of those to whom it is addressed. The distinction between a law which commands, and a compact or agreement which promises, it is sufficient barely to mention; it can need no illustration.

Municipal law, as being a rule of civil conduct, is distinguished from the law of nations, which is a rule of moral conduct, and of which we have already treated. The natural law of morals extends to every duty of man, as a social being, and as a being dependent on his Creator; it extends as well to those of imperfect, as to those of perfect obligation, as distinguished by ethical writers. While it enjoins the great duties of justice, essential to the existence of society, it also enjoins the duties of benevolence and charity, essential to its happiness—that each should do good to others according to their relative means, situation and opportunities.

The municipal law extends only to duties of perfect obligation. It regards men as members of the state only; its great and principal object is to enforce the duties of justice, both public and private; to compel each to render to others their just dues; to abstain from all those acts which are injurious to individuals or to the community at large; to punish crimes which affect the peace and safety of the citizens, or the safety and welfare of the state, and to compel a reparation of all injuries, whether public or private. Thus, although municipal law is founded in the law of nature, the great law of morals, and coincides with it to a certain ex-

tent, yet is it more limited in its end, regarding the happiness of men merely, and alone as connected with the civil state.

Municipal law is also a rule prescribed. This implies that the law be prospective, not retrospective in its operations, and that it is to be made known before it can justly be entitled to the attribute of a rule of civil conduct. For, to require that past conduct should be judged by its conformity or non-conformity to a law subsequently enacted, or that future conduct should be affected or judged of by a law enacted in secret, and of which no means of knowledge is furnished to the party to be affected thereby, is the supreme of tyranny, contrary to every solid principle of natural law, reason and justice.

And lastly, in what we may call the first branch of the definition, it is said that municipal law is not only a rule of civil conduct prescribed, but is a rule prescribed by the supreme power in the state. That the power to make laws which shall bind the community through all its members in the duty of obedience, must be paramount or supreme in the state, is too obvious to need illustration. For how can that be deemed a law, or rule of civil conduct, which may at any time be suspended, or its obligation dissolved, by any citizen at his option. In such case it assumes not the character of a law but of counsel or exhortation, which those to whom it is addressed may accept or reject at pleasure. It is true that by the constitution of a state, a temporary power to suspend the operation of a law may be vested in an organ, distinct from that of ordinary legislation; but this is only a participation of the supreme power, to the sove-

reignty of which appertains the power of suspending and repealing, as well as of enacting laws.

In this power of legislation, the power of suspending or repealing laws, consists the sovereignty of a state, whether this power be vested in a mere simple or more complex organ ; whether it be in the whole body of the citizens, as in a pure democracy, in a select body as in an aristocracy, in a single person, as in absolute monarchies, or in a union of all these forms, as in the parliament of Great Britain, consisting of the king, the monarch, the house of lords, the aristocracy of the country, and a house of commons, the representatives of the people, or democratic part of the nation.

It may not be foreign to this branch of our subject to make some farther inquiry into the origin and nature of civil government — the foundation of this sovereign power — and the right with which it is vested of enacting and enforcing laws.

I cannot readily assent to the proposition, however supported by great authorities — that the only true and natural foundation of civil society is the wants and fears of individuals — I think, as has been already briefly remarked, the foundation is more deeply laid in the laws of social nature ; in the adaptation of man to the social and civil state by that nature, which is the constitution ordained by creative wisdom and goodness. His wants, and his fears as an individual, arising from his weakness, which is inseparable from his nature in his state of existence, can be considered only as an inducement, a powerful inducement if you please, to avail himself of the laws of his nature, and by building on that foundation, to seek security against his fears, and relief to his wants, in local and civil institutions.

It has, I think, been already evinced that man is not only adapted by original constitution, but is, if I may use the expression, bound by the laws of his nature to the social state. A few observations may suffice to show his adaptation to the civil state.

If we inquire what it is which ultimately renders man a fit subject of moral government, we shall find it in his consciousness of moral obligation; or what we may, with a good degree of propriety, call his sense of accountability. The sense of accountability is the result of moral perception. When a man perceives in the result of certain existing moral relations, a duty enjoined, he is, in the performance of the duty, conscious of a sentiment of self-approbation accompanied with pleasure; in the neglect or violation, a sentiment of disapprobation, accompanied with pain to the mind, with displeasure. In viewing the moral actions of others, he finds arising in his mind towards the agents, similar sentiments of approbation or disapprobation, as the action may have been considered as morally right, or morally wrong. He finds this common to man, and conceives it to be a common principle in the law of moral beings. He perceives that the approbation or disapprobation of his own actions by others, as they have been a performance or violation of his moral duties, or in other words, as they have been right or wrong, to be just and due.

It ought to be added, that it is a principle implanted in the breast of every human being, that he should desire the approbation of others, and that he should derive a rational pleasure from the merited gratification of this desire. He has a consequent dread of their disapprobation, and suffers pain, is rendered unhappy by merited censure.

When man raises his views to the Supreme Being, his Creator, on whom he is dependent, he conceives an approbation, or, perhaps, to speak with more propriety, a complacency in the Divine mind, in the observance of the just laws which he has established, and a disapprobation in their violation by the creature. This view of the subject, with the conception of the Divine displeasure at the offence, brings home to the mind not only a sense of punishment experienced in the apprehension of the displeasure, but the full right and justice of punishment. By this branch of accountability to his Maker, and moral lawgiver, is man finally fitted, and his subjection to moral government completed.

From that sense common to mankind, that perception which every man has, that agreeably to the laws of his social nature, his actions, according to their merit or demerit, are of right subjected to the approbation or censure of his fellow-men, arises a second branch of accountability. The mutual accountability of each to all — different from the other in degree, extent and immediate object, but equally founded in the laws of nature, as ordained by the great first cause. Having taken this view of man and the laws of his nature, if it be sufficiently correct, it is obvious to conclude, that as his sense of accountability to his Creator renders man a fit subject of moral government, on the same principle his sense of accountability to his fellow-men renders him a fit subject of human, that is, civil government. If we have been at all successful in our inquiries, it is very evident that the foundation of civil government is laid on the broad basis of the laws of nature ; it is founded in those principles

which arise out of the nature of man, as a social and moral being. That man is under a necessity to adopt civil government is readily admitted ; not a necessity arising from fears and wants of individuals, or even from the perversity of human nature, but a necessity arising from his nature as a limited as well as social being. Let me endeavor to show in what this necessity consists ; and in doing this I shall not hesitate to repeat some of my former thoughts, when lucubrating upon the same subject.

Men have a relish for society. It is the scene of their improvements, and the great source of their happiness ; still no degree of individual strength, no possible goodness of heart, can enable them to enjoy its benefits without a provision of civil institutions and law.

Perception, consciousness, and volition, or those powers which originate external actions in men, belong to them individually. A society consisting of any number of individuals, can have no common united perception, consciousness, or volition. Could this be the case a society might well, and with the simple act of volition, direct and control the actions of all and of every one of its members with the same ease and regularity with which an individual directs and controls the motion of his own body and its members ; but this is denied to man in the aggregate, and in every combination of society. The will of the society is made up of the individual wills of its members.

Had man been formed with faculties which might have enabled him, with an intuitive glance to penetrate and comprehend as they arise the individual wills of all the members of the society, and of all whose conduct might any way

affect it ; to penetrate and comprehend the passions, appetites and pursuits of every individual ; in a word, to discern and comprehend all the causes by which God governs the actions of moral agents ; — were he endued with reason sufficient to arrange the whole, so as to prevent any individual interference — goodness of heart and purity of mind to enable him to pursue the arrangement in such a state, both of knowledge and disposition, — he would stand in no need of civil laws, or rules prescribed by common consent, for the regulation of social conduct. But such a state falls not to the lot of any finite being.

Our positive knowledge is only partial of the present and past, depending on actual and successive observation. There is, however, given us some clue to the future. We are able to perceive certain relations ; and as far as experience leads, we find a uniformity in the course of nature. We discover some of the causes and some of the laws by which physical effects are produced in a regular series ; of others we are wholly ignorant, or have at best but an imperfect glimpse. Much more limited is our knowledge of the causes which produce and vary human actions, subject to the influence of motives, to the choice of the agent, and to those laws by which they are governed in succession. In an extensive society, individuals can have but a limited knowledge even of the present actions of the whole. Their knowledge of the intentions and causes on which future actions depend, is much more limited. We are able to gain some knowledge of the leading principles of actions, of the motives which generally prevail, and the species of action they will produce in certain situations. But to descend to

every situation, to every character, and thence to learn fully the particular influence of motives and the individual actions, which will follow in each, is beyond the reach of human sagacity. In a society composed of any considerable number of individuals, and in a state of any considerable activity, there will be many and very different situations. The influence of motives upon individuals will be very different. They will have a variety of distinct interests and pursuits; and those not at all, or very imperfectly known to each other in their origin. However innocent and right those interests and pursuits may be, when considered separately, they will, by frequent, though unintentional interferences and oppositions, form a scene too intricate for the powers of the human mind to evolve. Could we suppose every person in the society actuated by principles of the most disinterested benevolence, and by the most accommodating spirit, the whole time must be consumed in attempts to compromise — none could be left for action.

Without a social perception, consciousness and volition, with any goodness, and with any wisdom short of infinite, the state of society would, at best, be a scene of inextricable confusion. To remedy such evil, nature has pointed out to man the necessity of civil establishments, and the promulgation of laws. Here man finds a provision analogous to his nature. By the establishment of laws, which the individuals of the community have submitted to observe as the rule of their future conduct, they are enabled, with a sufficient degree of certainty, to foresee the future pursuits and interests of each; following the line prescribed, they can avoid any considerable interference, or, by applying the rule,

remedy the inconvenience. In no other way is it possible to connect a community either in sentiment or interests, to unite the public force, to direct it to the attainment of any common good, or to the avoiding or repelling any common evil; in no other way is it possible to give any security to public or private rights.

Still men are imperfect; they will be guilty of deviations, transgressions of the law, and infringements of each other's rights. This will happen sometimes through ignorance of the law, or of the right; an ignorance which arises from weakness in judging, or inattention in examining. Sometimes it will happen through the prevalence of interest, or the violence of passion; therefore, to give laws a compulsory force, and to secure a general observance, they must be so calculated that every member shall find a convenience in the observance, but more especially a certain inconvenience in the neglect or violation. Hence arises the necessity of penalties. These penalties are, from the weakness of men in discerning tendencies, and their consequent liability to vice, necessarily enhanced. Hence, also, arises the necessity of subordination, and of civil rulers to give activity and efficiency to the laws. In a state of greater perfection than is to be found in the present state of society, a greater perfection in knowledge and virtue, penalties may make a less formidable appearance; but in every state the necessity of penalties will equally exist.

In a society composed of a few individuals, in a simple state of manners and of property, the motives to action are few; consequently there is little activity of individuals, and little interference of interests. A few simple rules, mostly

adopted and supported by custom, and frequent consultations upon present emergencies, supply the place of a more regular polity. They are the first rude essays in civil institutions. Still, in every state of morals and manners, a necessity of known and established rules or laws, equally exists. On the whole, we may safely conclude, that no order of beings short of infinite perfection, in wisdom as well as in goodness, can subsist in society without an establishment of civil government and law.

No. IV.

ON

THE SYSTEM OF LAW, AND THE PROPER METHOD
OF STUDY.

LECTURE III.

LECTURE THIRD.

My principal view, in this lecture, will be merely to make some strictures on the common law of England, its rise, progress, and formation into a science, and to add some observations on its study.

Man is everywhere the creature of habit. By repeated exercise of his corporeal powers and organs in any particular way, he not only acquires a facility and dexterity in the performance, but a fondness for the exercise ; it becomes a habit. It is the same with the mental powers, whether taken individually or socially ; to whatever course of action man may have repeatedly applied himself, a habit is superinduced. Such is the common nature of all persons. Social action is originated and directed by mental exercise. By repetition in such case, a mental habit is acquired. It is a habit of the moral and social kind, intimately connected with a notion of right and justice. Where the operation is on the minds of all, or the major part of the society, the habit becomes general, and thus a custom is introduced, by which is determined what is right and fit, what ought to be done in every case falling within the custom. In a word, it obtains a

binding force, and becomes the law of the society. Such appears to be the origin of national customs, or *common law*. Connecting with the moral feelings, these customs acquire to a degree the force of moral obligation, and are enforced by the same sanctions; the observance is felt to be right, the non-observance or violation, wrong. The observance, therefore, meets the general approbation, the violation, the general censure. Combining with the general interest, it is perceived to be the right of the community to require a general observance. In the progress of society new pursuits and new interests arise, and the state becomes more complex; the early customs, few and simple, become insufficient. The society, therefore, by themselves, or by some authority delegated or assumed, agree upon new rules, to be applied to those cases in which the customs already established are found to be deficient, and thus positive laws or statutes are introduced. These new laws being frequently altered, modified, repealed and revised, never obtain, as such, that habitually binding force which attaches to the ancient customs. Some of these positive laws, made in the early stages of society, may, however, be lost, while the rules which they have introduced in practice, continue to be acted upon. Such rules will now be considered as customs, and binding as such; and such, in its origin, was the Common Law of England. It has indeed, in its progress, received great additions from various sources, until it has grown up into that vast fabric, that comprehensive system which we now find it. Most writers on the subject have held, that the customs of which the common law of England is composed, originated with the Saxons

who conquered that island; and this from a belief that the ancient inhabitants, in that event, were wholly exterminated within the limits of the conquest. But it seems probable that the great multitude, of villeins or people reduced to slavery among them, — and such were with them almost all the cultivators of the earth, — were a remnant of the conquered Britons, the ancient inhabitants. It is reasonable to suppose that these were of the lower class of the Britons; those of the higher class, and the most warlike, having perished in the war, or fled into the almost inaccessible mountains of Wales. From those who remained, it is highly probable that the Saxons received and adopted with their own some of the British laws and customs. Some of these were, we may suppose, of Roman origin, as Britain had for centuries been a Roman province, and all the laws had been administered by Roman governors and judges. But from the degraded state of the Britons who remained after the Saxon conquest, their laws and customs might not have obtained to a very considerable extent. I think, however, this will account for the similarity found in some of the earliest Saxon laws to the Roman or Civil law. The body of the customs, however, were of Saxon origin. Upon the Saxon conquest, England had been divided into seven independent kingdoms, called the Heptarchy, in which customs somewhat different obtained. The Danes, who conquered and made permanent settlements in some parts of England, and even at one time obtained the sovereignty of the whole, introduced some of their customs. After the union of the Heptarchy under one sovereign, Alfred the Great, a prince the most learned of that age, collected all the customs and

laws of general application, into one code, and ordered that it should be observed throughout the kingdom. Alfred also made a civil division of the kingdom into counties, hundreds, and tithings, and established county and some other courts. These divisions and courts, though with some alterations, still continue. A revision of Alfred's code was commenced by Edgar, and afterwards completed by his grandson, Edward the Confessor, and probably with some additions.

A very great alteration was made in the common law by the introduction of the feudal system into England, by William the Conqueror. This system was for some time refined upon, and carried to a great extent by the courts now filled with Norman judges, and who were frequently guided by the laws and customs of their own country. The books of the civil law, which had long been supposed to be lost, having been discovered, were studied with indefatigable zeal by the clergy, who almost monopolized what little there was of learning in that age; the advocates in England were mostly of this class, as were also many of the judges. And although the civil or Roman law was never publicly allowed to have any force in England, and was not cited as authority, yet the decisions of the courts were in many instances influenced by its rules. Accordingly, we find that Glanville, chief justiciary of England, and a noted law writer in the reign of Edward I., as well as some other writers who followed him, have, although without reference, copied into their works many passages of the civil law, which were taken as part of the common law of England. Indeed, as commerce and personal property increased, and personal

contracts, which in those times had in consideration of law, occupied the back-ground, became important, the books of the civil law furnished the best, nay, the only practical rules to which resort could be had. In such cases we shall even find that down to later times—from the same source, but without acknowledging the authority of the civil law, were drawn many rules and maxims for governing decisions in cases of personal contracts, deposits and trusts. Very few statutes of the first Norman kings are now to be found. It is very certain, however, that the statutes passed in those early times, introduced a course of decisions, which after the statutes were lost and forgotten, came to be considered as a part of the common law. We further find all the early statutes were very short, and indeed mere capitularies, establishing some material point, and leaving all the rest to the interpretation of the judge. These interpretations and the rules and maxims adopted by the court, to elicit the meaning and to give effect to these summary acts, may be considered as a great addition to the common law. To instance—in the statute of Westminster 2d, commonly called the statute *De-donis*. This statute enacts, that henceforth in all donations, the will of the donor shall be observed. From this short sentence, by construction, has been deduced all the various species of estates tail, and all the doctrines concerning them which occupy so large a space in the English law of real property. Great additions to the common law have continued to be made down to the present time. The law merchant, a very important branch of the law, has been very greatly extended and improved. It has been, and by some still is, considered to be a particular custom, but it

certainly now is, whatever it might have once been considered, a legitimate branch of the common law. It comprehends a very extensive and important branch of contracts. Nor is it at all material whether any of the parties to such contracts, be merchants or not. If neither of the parties be a merchant, it is, by all, allowed to be sufficient to say, it is a mercantile transaction, and therefore to be decided on the principles of the law merchant, whatever may be the character of the parties. But for a custom to extend to all through the kingdom, without limitation of person or place, answers the fullest definition of the common law. The common law, in connexion with the statute law, forms a system, the knowledge of which is called the science of law.

To those who are engaged in this study, it may be useful to inquire, how this system has been formed. It may serve to facilitate their progress. It has not been formed into the system, into which it is grown, from any previous or cotemporary design directly intending to produce such system. Those who, in the progress, have furnished the most valuable materials, and have contributed most to its perfection, appear to have had no such particular aim; and even, for the most part, not to have thought it capable of being reduced to a system. It has been prepared and adopted through the influence of that tendency to analogy which is so natural to the mind of man, by means of which everything in his pursuits turns towards, and finally takes a systematic form. From this, every child in learning to speak, not from being taught, but from a natural propensity, pursues and is guided by analogy. When he has once learned to express his meaning of things, in the little circle of his knowledge, he

will, in the use of words that are anomalous, constantly, until otherwise taught, form them according to the analogy of the language, although he shall never have heard of analogy, nor be even capable of understanding its meaning. From this general propensity to analogy in everything, in a course of action, whether pursued by one man only, or by several in connection or succession, there is a constant tendency to system, whether directly intended or not. In this way have been prepared almost all the great systems to be found in the arts and sciences, within the whole compass of human knowledge. The materials had been prepared, the several parts had been formed, and had received their adaptation long before the systematic proportions were suspected. In such a state, what is called forming a system, is nothing more than a discovery of its existence, and an orderly and well-arranged description and delineation of its several parts and relative proportions. We now apply the name of system to the systematic description — to an orderly and scientific disposition of the names of the several parts. We also, by an allowable figure, give the name of system to a treatise on such a subject. Far be it from me to depreciate the merit of such discovery and arrangement, often, very often, of incalculable benefit to the scientific world. It frequently requires a perspicuity, a force and comprehension of intellect, which falls to the happy lot of a few of the human race.

It has fared with the laws of England as with other systems which have grown up in a long course of gradual improvement. For centuries, it was hardly, if at all, thought capable of being treated systematically. The best method,

it was thought, was to treat of the several parts or heads, according to an alphabetic arrangement of their several titles. This arrangement, be sure, has the convenience of a dictionary ; but, for any scientific purpose, the disposition might have as well been made fortuitously.

Such was the arrangement adopted by Viner, by Bacon, Comyns, and many others. Some heads of the law had been treated under a more scientific form, but with very little illustration from deduction, or connected reasoning. Such treatises consisted mostly in a collection of rules, maxims, and decided cases, considered as applicable under the several heads. The lawyer and the student were left to make their own deductions and conclusions, and to apply them each by the force of his own reasoning. In this situation the study of the law was laborious indeed. The "*Viginti annorum lucubrationes*," was sufficiently short for attaining any competent degree of knowledge. That eminent lawyer and judge, Sir Matthew Hale, who flourished in the reign of Charles II., was the first, so far as I have been able to learn, who conceived the opinion that the law of England was capable of being reduced to a system, and of being treated scientifically. With this view, in his history of the common law, an unfinished work, not published until after his death, he had exhibited a complete scientific analysis of the law. This conception Judge Blackstone afterwards realized in his Commentaries. He has taken from the great divisions of that analysis the titles of his four books, and from the subordinate divisions, the titles of the subordinate divisions contained in his great work. Since the publication of the Commentaries, there have appeared a

great number of treatises upon distinct heads of the law, many of them handled in the same masterly and scientific manner. Such are Chitty on Pleadings and on Bills; Jones on Bailments; Powell on Contracts, on Devises and on Mortgages; and many more too numerous to mention. All these have, in a very high degree, facilitated the progress of the student, and aided the researches of the lawyer. It may not be amiss again to refer to the propensity to analogy, already mentioned—to attend briefly to its necessity and use in the acquisition of all general knowledge; and the necessity of a particular attention to it in the study of the law. United with the power of abstraction and association, it lays the foundation of all general knowledge and science, and without which we could never attain anything beyond the mere knowledge of individuals, without the possibility of drawing one general conclusion. Our first acquaintance is with individuals; among a number of individuals, as where man is the subject, is observed a great degree of similarity in their make, powers, faculties and dispositions. They differ indeed as individuals, but abstracting from that difference by which individuals are distinguished, it is perceived that what is predicable of any one, is predicable of each and of all. From a view of the intimate analogy and association of all in which the individuals agree, the mind is impressed with the notion of a common nature—an abstract whole; or, if I may use the expression, an abstract individuality, in the united conception of the individuals, and is able to draw general conclusions, and lay down general principles, without bringing any particular individuals, or succession of individuals into view. Other individuals are

observed differing from the first in many essential qualities, but having a great degree of similarity, an equal analogy among themselves. Take the instance of sheep in the brute creation; these will by the same process be associated in the mind into a distinct group, and so of other individuals almost without end. These groups, in regard to a still higher classification, are denominated species. To enable us to converse and reason with clearness in anything concerning these species, we give to each a distinct and appropriate name. This name, from habitual use, becomes in conversation, and even in the mind, the representative of its particular species, and has, by some sects of metaphysicians, been held to be the very essence of its species. It is further perceived, that there subsists a general analogy between several of these species, notwithstanding the difference of the individuals of which they are severally composed. As between those already mentioned, the circumstance of their having animal life in common. From this general analogy the mind refers them to and associates them into a further class, which, in respect to the species, is called a genus or kind. Thus all the species will be grouped into general kinds, according to the respective analogies apprehended by the mind. The same process is carried on, the number contained in each decreasing as we ascend, until, as far as the human mind can extend, it embraces the whole universe. This may be called the system of the universe.

A similar process is carried on with similar results—a systematic classification upon all subjects with which the mind is conversant, whether it be physical or moral, material or intellectual, or of a mixed or complex nature. We

are not, however, to suppose that the mind is always conscious of exertion in forming these associations. In the early stages and common occurrences of life it appears to be an impression on the mind, rather than the effect of any immediate exertion. Sometimes, indeed, when, from any circumstance, it is doubtful to what class a subject ought to be referred, the discriminating powers of the mind are exerted, as also in attempting an accurate arrangement for scientific purposes. Upon the whole, it very nearly resembles what is usually denominated instinct. It must be considered as it regards man, as one of those adaptations of the being to its situation and end, so conspicuous in all the works of the Creator. It is one of those things, without which man could take no one step in moral or physical reasoning, or direct his actions to the attainment of any end whatever. The science of law is a civil and moral science; the science of the modes and rules for administering justice in a society of moral beings.

Whoever examines the English law, as a science, will find it formed into a system in the same manner as has been the case with other systems. The lowest and most minute divisions answering to individuals; those grouped into heads answering to species, and these again into larger divisions, answering to genera; and so on, ascending until it embraces the whole, closely and firmly united, and distinguished by their respective analogies. In the study of this science, as in all others, it is necessary, first, to take a general view of the system; to obtain a knowledge of its divisions and their distributions, the leading rules and axioms; in a word, to obtain a good knowledge of its elements. All

this the attentive student will find in the volumes of Blackstone, which, as an elementary treatise, has not been surpassed in any science. The next step proper to be taken by the students is, to proceed analytically; to begin with one branch, and the minor divisions of that branch, to make himself fully master of it; then, and not till then, to proceed to another branch, until he shall have encompassed within his knowledge the whole system complete. In his course of reading, it is indispensable for him, if he wishes to make proficiency, to turn to all the cases and authorities, and to examine them for himself; not merely to find the conclusion and point of the authority, but, if possible, to make himself master of the arguments and reasons of the author or judge, which were relied upon as leading to that conclusion.

Here it is necessary to observe, that the reasoning in the application of precedents is wholly analogical. The whole force of the authority depends on the strength of the analogy. It is therefore necessary that the student should endeavor, as he proceeds, as much as possible to acquire a clear and distinct perception of the analogy, in all and every part of the law; that he may be able, at a glance, to measure, if I may use the expression, the distance or proximity and direction, and to estimate its force. Lord Mansfield observes, in effect, in the case of *Jones v. Randal*, that the great use of precedents is to illustrate principles, and to give them a fixed certainty; without analogy, they can afford no possible illustration. To any one who has no perception of the analogy, precedents can exhibit nothing but an incoherent, indigested and heteroge-

neous mass of individual cases, leading to no conclusion, and affording no grounds of decision. A lawyer who, as sometimes happens, has been inattentive to analogy, misled by mere similarity in a word or expression, will not unfrequently produce, as an authority, a case entirely foreign, or which may even conclude against his argument. Every student should therefore labor to acquire a ready and clear discernment upon this subject.

I shall conclude with one observation more. Let the student not content himself with merely learning to recollect or repeat the arguments and reasons which he has met with in reading, as the arguments and reasons of others ; but let him endeavor so to penetrate, understand and appropriate them, that they may appear to his mind to be exclusively his own. The former is mere memory ; the latter only is knowledge.

No. V.

ON THE RIGHT OF PROPERTY.

LECTURE IV.

LECTURE FOURTH.

Our present inquiry will be, whether the right of property, so much the object of all laws, that right which a man claims to the exclusive possession and enjoyment of any subject, be derived from the laws of nature, or whether it originate in the positive laws of society.

Judge Blackstone, in the beginning of the second book of his Commentaries, has treated of the subject of property, but his attention was wholly taken up with the mode of acquisition, the legitimate mode in which private property might have been first separated from the common mass. He takes for granted that the right of property is not a natural, but a civil right; that it has its origin in the positive laws of society. His learned annotator, Mr. Christian, is dissatisfied with this opinion. He asserts, that there is a law of property, which nature herself has written upon the hearts of mankind: that the notion of property is universal, and is suggested to the mind of man by reason and nature, prior to all civil institutions. He has shown the theory of Locke, who derives the right of property from the personal labor of the individual, bestowed upon the thing, in separating it

from the common mass and preparing it for use; and of Grotius and Puffendorf, who make the right of property depend on a tacit agreement for the separate use and enjoyment, to be wholly unsatisfactory. It is to be regretted, that he has not given some further explanation, of which he was so capable, and shown how and why it is to be referred to the law of nature. As he has very justly observed, it is of great importance that moral obligation and the rudiments of law should be referred to true and intelligent principles. What the learned annotator has omitted, probably from the circumscribed limits of an annotator, I shall endeavor to supply.

In the physical world we discover, in certain relations and combinations of matter, or physical bodies, certain consequent results or effects. Having learned by repeated experience of ourselves and others, from common experience, that the same effects are constantly and regularly exhibited by the same matter or physical bodies, placed in the same relation and combinations, we say it is natural that the effects are, in such case, produced according to a law of nature. In many instances, as in mechanics, that such will be the effect produced by a certain combination of matter, is a subject of mathematical demonstration. But we see, and can only see, and describe the matter, its relations, combinations, modes of operation, and the effects produced, and here we must stop. Why such should be, and uniformly be the effect, we can never explain; we can only refer it to the constitution of nature, as established and ordained by the great Author. It is the same in the moral world. The subjects are indeed different, and so are the

relations and the results ; these are moral, not physical : they are also discerned by a different faculty, a moral perception, a faculty of the mind by which it perceives moral subjects, relations, and results. When an individual is placed in a certain situation, that of a parent, for instance, in this situation he perceives certain moral relations subsisting between him and the child, from which he perceives to result certain moral duties. He finds that all others have the same perception of the same relation and its results ; that it is common to man. It is perceived, or rather felt, that these duties are obligatory ; hence it is considered a law, a law of nature, a moral law. The former which we mentioned are the result of physical relations and combinations, this of moral relations ; that a law of matter, this of mind ; that of physical necessity, this of moral obligation ; that we conceive to exist, without intelligence or consciousness in the subject, this cannot exist without intelligence and consciousness. Further, the latter exists in social relations ; exclude social relations, and moral obligation is excluded. For what can be the moral obligation of a being, in other respects like man, placed in total exclusion from all relation to any sentient, intelligent being, connected with objects and beings merely physical ? Certainly it is a thing not easily to be conceived. Social, intelligent beings are the only subjects, and principal objects of moral law. I do not say the only objects, because I would willingly extend it to all sentient beings. How do we determine what a moral law is ? Certainly from a common-perception. Suppose a being, formed in other respects like man, but never endowed with the faculty of moral perception ; to such a being there could be

no moral law, no moral obligation. In any class of moral relations, however complicated, the perception of the result is as simple as that of unity. It cannot be communicated to any one who has not a capability of the same moral perceptions, when the same moral relations are presented to view. So to present them, is the great business of moral instruction ; the result must be referred to the common perception, or as some writers have expressed it, to the common sense of mankind.

We are now prepared to inquire, on what original foundation rests the right of property. Whether it be recognized by the natural law, or originates solely in civil institutions. Every one, attending to the operations of his own mind, in certain circumstances, perceives between himself and some external objects, certain relations from which results to his mind a right—a perception that the thing is his—a right of property. He perceives in like circumstances the same relations between another person and certain other objects, with the same result—a right of property, which may be expressed, an exclusive right of dominion in and over the thing or subject contemplated. He finds also that the perception is common and universal ; that all mankind, although it may be a question whether the relation has arisen in a particular case, and under certain circumstances, agree in the general result. If what has been before observed concerning the origin and proof of physical and moral laws, be correct, the right of property is found to stand on the same foundation, for proof of its existence, in natural law, as any moral right or duty whatever. It is true it seems not to be a law of physics ; it seems not in itself a

moral law, but it has an important place in a very extensive class of moral relations, from which moral duties result — in all those cases in which the maxim applies, *Sic utere tuo ut alienum non lædas*, and do good to those who have need, according to your means.

Natural law arises from the constitution of man, as ordained by his Creator, and from the relations in which he has seen fit to place him to other beings and things. It must, therefore, be adapted to the nature of social man, and tend generally to his happiness. General utility is the end, and the final, though not, I apprehend, as some have held, the efficient cause of social rights and moral obligation. If brought to this test, the natural law, in which is founded the right of property, will be found not only generally useful to social man, but absolutely necessary. It will be found in the most simple, rude state of society, necessary to the subsistence of the individual, and still more necessary, in any advanced stage of improvement. I shall add with some corrections, a part of what I wrote many years ago on the same subject. As already observed, the relation from which results the right of property seems not to be a moral relation, nor wholly a corporeal relation of parts. The relation between me and the table on which I write at present, by which it is mine, seems to have nothing of a moral quality in it, without the intervening relation of another person. It is doubtless very simple; it has never been defined, otherwise than by the mode of acquisition; as the price of land is, As he bought it, it was given to him, it came to him by descent. Indeed to simple objects, whether of substances or relations, names are necessary, but definitions are useless and imprac-

ticable. Nature has denied them in every instance. The discovery, therefore, of a simple object, a simple relation, or of a result, which is always simple, is not from reasoning, but from intuition. This perception of the relation and right of property, though at first very limited, a mere capability, and like the other faculties subject to a course of improvement, is discovered in the early stages of life. The child has clearly a sense of the right of property, though very little, if any, of the modes of acquisition. He appears, before he is capable of consequential reasoning, as clearly to understand his right to his rattle-box, as the adult to his horse, purchased with his money or his labor; and vindicates his right of property with as much apparent consciousness of that right. The perception, however, extends little further than his own right; it can hardly be said to extend to the rights of others. Many brute animals to which we have denied the power of reasoning and investigation, appear evidently to have some sense of property. Give a bone to a dog, he takes it boldly as his own; let another attempt to rob him of it, he stands boldly in its defence, with a seeming consciousness of his right of property, while the aggressor approaches with an apparent consciousness of his guilt. The ox claims his right to his stall, and the dog to his wonted corner. Instances have been given of a sense of this right, in the ape, the beaver, the stork, and some other animals, which have not fallen under my observation. I therefore omit them.

It would be strange if Providence had been less kind to man than to the brute creation — man, to whom property is so extensively useful, and which, in a state of society, becomes the object or instrument of most of his moral actions.

It is to be observed, that the perception is only of the right or the relation which constitutes property, but extends not to the mode of acquisition, any farther than they contribute to the relation. These modes, according to the state of society, may be very various. In the early stages of society, or what is frequently called a state of nature, the objects of property are almost as few, and the modes of acquisition nearly as simple as among many species of the brute creation. The objects of property are those things only which are necessary to support existence. The modes of acquisition mostly confined to prior occupancy, and some trifling productions of labor. The simple modes of gift and exchange are soon added. In the progress of society, men learn to apply to their use, either for their necessities or pleasure, most of the numerous productions of nature. By the assistance of art, as the powers of the mind expand, they vary and multiply these without end. In proportion as men enlarge their views of what is useful or agreeable, the hoarding appetite gains strength; they become eager of the present, and provident of the future. The objects of property become equally numerous with the objects of desire. In such a state the modes of acquisition are greatly multiplied, and are made the subject of a great variety of laws and regulations. The whole business of property now appears to be an artificial system; but the modes of acquisition and the means of protection only are the subjects of artificial regulations. The right itself of property, as already shown, is founded in the law of nature, and is antecedent to all civil regulations; the modes of acquisition serve only to bring the subject of property within the right.

Here let me observe, from this view of the right of property, we clearly discover that it is not, as many writers have asserted, a creature of the civil law only. The position, that, on a dissolution of government, all property is annihilated, and that every revolution of government, or radical change, is destructive of the right of property, is, by no means, just. Civil protection only is lost, the security of enjoyment is endangered, the right itself founded on the law of nature, remains unchanged. Without this perception, which I have so often mentioned, the right of property would be but weakly guarded by the moral sense. Were it a discovery of reason, a conclusion from its convenience in society only, it must want a considerable maturity of the reasoning powers; it must be wholly unattainable to children; and certainly no person until he had, in one way or another, attained the perception, would feel any obligation of restraint. Force alone could prevent a constant violation of the right of property. Prohibitory laws would be considered as so many arbitrary impositions. How much better is the plan of Providence. Who can forbear to admire the wisdom displayed by the Author of our being, in the adjusting of the nature of man to that social and civil state, which he has ever found necessary not only to his happiness, but to any tolerable existence in life? Deity has implanted in man the germ of every necessary qualification, and left to him the cultivation; more, it is probable, could not be indulged to a moral agent.

No. 6.

OBSERVATIONS

ON

MR. CALHOUN'S EXPOSE OF HIS NULLIFICATION

DOCTRINES,

PUBLISHED IN THE RICHMOND WHIG.

OBSERVATIONS.

WE understand Mr. Calhoun to hold, 1, That the principle contended for by South Carolina (nullification,) was at the bottom of the contest between the federalists and republicans, (anti-federalists.)

2. That the national government is a compact between separate sovereignties, (the states,) to which the whole people were not parties.

3. That these separate sovereignties have the right, each for itself, to judge of any violation of that compact by the general government; and on this principle depends the security of liberty.

4. That the supreme court of the United States is not constituted a common judge between the parties. It has no political jurisdiction, and besides, from the manner in which it is constituted, it cannot be considered as an impartial tribunal in cases of this nature.

5. That in all free governments each separate interest must have a right to protect itself; that in questions bearing on those interests, the majority, as such, have no right, that is, of absolute control.

6. That a state may peaceably and efficaciously resort to the right of self-protection, and may, within the limits of its jurisdiction, nullify any law of the general government, bearing hard on the particular interests of the state; still remaining subject to all the laws of that government, except the law so nullified.

7. That the tariff is unjust, unconstitutional, and oppressive.

8. That the period of the payment of the national debt is the crisis for which the southern states will wait, expecting a modification or total repeal of the tariff laws.

9. That the next session of congress will be the only time for modifying the tariff, &c.

10. He does not define the remedy to be adopted if the tariff be persisted in, but leaves us to suppose it will be nullification.

11. He is indisposed to resort to any remedy by state authority, until the crisis shall arrive.

12. He declares himself a friend to manufactures, and disposed to give them every incidental encouragement.

It is, in some sense, true, that the principle for which South Carolina contends, and which is here advocated by Mr. Calhoun,—the right of a state to nullify a law of the general government,—was at the bottom of the contest between the two great parties, which originated at the time of the formation and adoption of the federal constitution, then denominated federalists and anti-federalists. The anti-federalists, who were the minor party in the general convention, objected to the powers proposed to be given to the general government, because they said those powers would

not only restrict the sovereignty of the individual states, but, in some instances, wholly take it away, so that, in future, instead of being sovereign and independent, they would be nothing more than corporations subject to the general government, the constitution of which, and all laws made in pursuance of that constitution, are declared to be the supreme laws of the land. The same objections, in substance, were urged, in the conventions of the several states, by those who were opposed to the adoption of the constitution. It was agreed by those who were in favor of its adoption, that the constitution, if adopted, would take from the individual states the independent national sovereignty, and vest it in the general government for the whole nation; that there were provided certain limitations upon the internal sovereignty of the several states, which, it was believed, the general good required, — limitations clearly expressed, and sufficiently marked; leaving to each state, in everything else, the whole internal sovereignty, and that unassailable as far as it could be guaranteed by that constitution. After the adoption of the constitution, and under the presidency of Washington, those who were opposed to the adoption of that instrument had formed a strong party, both in and out of congress, at the head of which was Mr. Jefferson. Professing to be zealous advocates of state rights, and fearful of what they deemed the consolidating tendency of the powers granted by the constitution, they soon became almost indiscriminate opposers of the measures of government. Those who have had a personal acquaintance with the political transactions of those times, or have read with attention the debates in congress, and the publications of that day, will

be convinced that the party contended, for the most part, for reducing the powers of government within the limits which they would themselves have prescribed in forming the constitution, without regard to the actual limits prescribed by that instrument.

This contest, like all contests of a political nature, soon degenerated into a contest for power, a contest of ambition, accompanied with all the excitement, the misrepresentations and virulent abuse, to which political parties usually resort, so that it may be asserted, with the confidence of truth, that the prevalence of the party, which brought Mr. Jefferson into power, was a triumph of ambition, a triumph of party, not of principle. This will appear very evident to any one, who will impartially examine the measures pursued by one party, the Federalists, under the administration of Washington, and the elder Adams, and the measures pursued by the other party under the administration of Mr. Jefferson, and his successors. He will find that the latter have given, at least, as extended a construction to the constituted powers of congress, and have pushed their acts as near the verge of those powers, as did the party of whom they so loudly complained, and whom they succeeded. They indeed suffered the act, establishing the Bank of the United States, which they had always condemned as unconstitutional, to expire by its own limitation. But, finding by experience that it was highly expedient, or, in the language of the constitution, that it was necessary and proper, to any economical administration of the finances, that there should be a bank of the United States, they established another on the same principle, as it relates to the constitutional question, as the former

bank. The purchase of Louisiana, and the several acts for laying and enforcing a general embargo, are instances of constitutional powers taken by construction, and pushed, one may say, to the extreme point; and which were held by very many, among whom were men of the first talents, to be unconstitutional, particularly the latter, the embargo laws. The expediency of those laws may well be doubted, but that they were within the constitutional powers of congress, is, I believe, now doubted by no discerning jurist, or by any one deserving the character of a sound statesman. But there was one act passed during Mr. Jefferson's administration, that was a gross violation of the constitution. Mr. Livingston, now secretary of state, then residing in Louisiana, had purchased a very valuable tract of land in, or adjoining, the city of New Orleans; it was reported to Mr. Jefferson as being public land, belonging to the United States. Mr. Jefferson, by message, gave this information to congress, and recommended that a remedy should be provided for the removal of intruders on public lands. On which an act was immediately passed, authorizing the president of the United States, on information of such intrusion, to issue his precept to the marshal of the district or territory, for the removal of the intruder. On which the president, Mr. Jefferson, immediately issued his precept, and Mr. Livingston was thereupon put out of possession without trial or inquest. Mr. Livingston, considering the act as unconstitutional, and the precept as illegal, commenced an action of trespass against Mr. Jefferson, in the circuit court of Virginia district. But it failed, on an objection taken by Mr. Jefferson's counsel, that the action being for trespass on land, was local, and the land

not lying in the district of Virginia, it could not be there tried. Mr. Livingston brought an action for the recovery of the land in the proper court, and recovered on his title. This was done by the man and the party who had boasted that the constitution was saved by them at its last gasp.

Mr. Calhoun states, as a leading principle, that "the general government emanated from the people of the several states, forming distinct political communities, and acting in that separate and sovereign capacity ; not from all the people as one aggregate political community ; that the constitution of the United States is in fact a compact, to which each state is a party in the character already described, and that the several states or parties have a right to judge of its infraction, and in case of a deliberate, palpable, and dangerous exercise of powers not granted, they have a right, in the last resort, to use the language of the Virginia resolutions, to interpose for arresting the progress of the evil."

It is true that in forming, or rather in executing the compact establishing the general government, the people of the several states acted separately, each for themselves and their respective communities ; still the binding force of the act depended on the concurrent acts of the people of all the states in their separate conventions. The people in no instance acted in the capacity of that sovereignty, which by their state conventions, they had entrusted to their then respective governments, as organized. They acted in the capacity of that primitive sovereignty, by which they had formed their several state constitutions, retaining the power of altering and modifying those constitutions, in each case, as they should find the public good to require. The Federal compact thus

ratified and executed, by the people of each state, became a mutual compact between all the people of the United States, binding upon themselves and their several state governments. In strictness of speech, the people were the original parties, and their respective states, their authorized agents, so far as empowered by their several state constitutions, and the constitution of the general government. In this character, and so far, the separate states, each acting through the organ of its own government, may with propriety be considered as parties to the federal compact.

According to the principles of our political institutions, it was necessary that the constitution of the general government should be submitted, for ratification, to the people of the United States, because the acts and laws of that government were intended to operate, and to be carried into effect, not upon the states as such, but directly upon the people themselves. It was also necessary that it should, for that purpose, be submitted to the people of each, separately and distinctly, because it was necessary to any beneficial operation of that government, that very considerable alterations should be made in all the existing state constitutions, and that, as far as it related to that government, they should be reduced to a uniformity. This was proposed to be effected by provisions inserted in the proposed constitution of the general government, which being adopted and ratified by the only competent authority, the sovereign people of each state, by themselves, all the necessary alterations, modifications, and limitations of power under the state constitutions would be effected, and the requisite uniformity produced. But the people of one state have no possible right or power

to act with the people of another state, in forming, altering, or amending their constitution. It was therefore necessary, that the people of each state should act by themselves.

Now if the people of the several states had, as a preliminary step, made the same alterations in their several state constitutions, as were effected by the constitution of the general government; and then the people of each state had sent their delegates to a general convention, with full powers for that purpose, and such convention had ratified the constitution of the general government, this act of ratification would have been the act of the sovereign people of each state, equally binding on themselves, and their respective governments; and the states would have been parties to the compact in the same sense that they now are, and no other. It is not in the power of human ingenuity to find or make an available distinction in the result.

In fact, however, the great question is, not whether the individual states are in any sense parties to the compact, but what character they sustain as parties. The writer seems to have been sensible of this; he has, therefore, as well as those whom he cites as authority, without hazarding any proof or argument, assumed that the states among themselves, and in their relation to the general government, sustain the right, the power and character of independent sovereignties. Hence is claimed the right of each to judge for itself. If what is here assumed be true, it is also true, that in questions arising between one state and another, and between a state and the general government, no common judge can be authoritatively interposed.

To come to a proper decision on this subject, it is neces-

sary to examine it a little more at large. This right of a state, under our government, to judge definitely for itself, of the constitutionality of an act of congress, has been generally, if not universally, claimed by its advocates as a right reserved to the state, by the 12th article of amendments to the constitution, which is in these words:—“The powers not delegated to the United States, by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.” Now the grant of a power contains, not only the power literally expressed, but by unavoidable inference, all those subordinate powers, without which the power expressed could not have any effect, or the effect manifestly intended. So in regard to prohibited powers. The prohibition extends not only to those powers, which are expressly prohibited, but such as are comprehended by necessary inference, or, which remaining, would defeat the prohibition. Those powers are also in this view to be considered as prohibited which are exclusively delegated, or being delegated, from their nature, or the nature of the subject, cannot be exercised both by the government of the United States and the state governments at the same time.

This is a sound and universal rule of construction, understood and acted upon by those who proposed, and those who adopted, the constitution and the amendments. Indeed, the amendment is merely declaratory of the construction originally intended, and well understood. It was inserted merely from abundant caution. Keeping in mind this rule of construction, let us inquire whether the right of a state to pass, for itself, a final judgment on the constitu-

tionality of a law of congress, which necessarily implies the sovereignty and independence of the state, from which alone it can be derived, is one of the rights reserved in the amendment above recited. If this right, and the power from which it must have been derived, are included in the reservation, the power must have existed in the several states at the time of the compact, and by that compact have not been prohibited to the states, either expressly or by unavoidable inference, agreeably to the rule of construction laid down. That an equivalent power existed in the several states under the old confederation, cannot and need not be denied. It was the result of that independent sovereignty then possessed by each state. The old confederation was not a national union, but a federal connection, — a league between thirteen sovereign, independent states, — or we may with propriety say, nations, by which they agreed to submit the management of their common concerns to a congress, the members of which were appointed by each state, and in whose deliberations each state had an equal voice. Under that confederation there was no establishment of a judiciary to be a common judge between the parties; no efficient executive power to carry their measures into effect. The ordinances and acts of that body, therefore, notwithstanding any style of authority they might assume, were, in all things relating to the states, merely recommendatory of certain measures which could not be carried into effect without the concurrent act of each and every state in whom resided the judiciary and only efficient executive powers. A full conviction from experience of the utter inefficiency of that government, if it deserved the name of government, which dissolving in its

own weakness, and threatening general anarchy or dissolution, even of the state governments themselves, led to the formation and adoption of the present constitution of the United States. It becomes, then, an important question, how far and to what purposes that independent sovereignty, which previously existed in the states severally, was, by the adoption and ratification of the constitution, transferred by the sovereign people of each, to the general government, and its exercise prohibited to the several states, with certain limitations on their internal sovereignty, which it was believed the general and national interests required. Mr. Calhoun has cited several authorities in support of his assumption of state rights, but has not referred, as I think, in a single instance, to the authority of the constitution, which, as he considers the right claimed, as a right reserved to the states in the amendment recited, and therefore a constitutional right, ought to be considered paramount to all others. Before I examine his authorities, I shall recite from the constitution the powers delegated to congress, the limitations and modifications of those powers, and the prohibitions and limitations imposed on the powers of the several states. From these, and these alone, can we learn whether the power, from which alone the contested state right can be derived, could possibly remain to be a subject of reservation.

The principal powers delegated to congress are contained in the first article of the constitution, as follows :

Sec. 8th. The congress shall have power to lay and collect taxes, duties, imposts, and exsises ; to pay the debts, and provide for the common defence, and general welfare of the United States ; — to borrow money on the credit of the

United States ; — to regulate commerce with foreign nations, and among the several states, and with the Indian tribes ; — to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcy, throughout the United States ; — to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures ; — to provide for the punishment of counterfeiting the securities and current coin of the United States ; — to establish post-offices and post roads ; — to promote the progress of science ; — to constitute tribunals inferior to the supreme court ; — to define and punish piracies and felonies, committed on the high seas, and offences against the law of nations ; — to declare war, grant letters of marque and reprisals, and make rules concerning captures, both on land and water ; — to raise and support armies ; — to provide and maintain a navy ; — to make rules for the government and regulation of the land and sea forces ; — to provide for calling forth the militia to execute the laws of the Union, to suppress insurrections and repel invasions ; — to provide for organizing and arming the militia, and for governing such part of them as may be employed in the actual service of the United States, reserving to the states respectively the appointment of the officers, &c. To make all such laws as shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or any department or officer thereof.

Sec. 10th. No state shall enter into any treaty, alliance or confederation ; grant letters of marque and reprisal ; coin money, emit bills of credit, make anything but gold and

silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility. No state shall, without the consent of congress, lay any imposts, or duties on imports or exports, except what shall be absolutely necessary for executing its inspection law, &c. No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any compact or agreement with another state, or with a foreign power, or engage in war unless actually invaded, or in such imminent danger as will not admit delay.

The second article provides for an executive power.

Sec. 1st. The executive power shall be vested in a president of the United States of America. He shall hold his office for four years. (The remainder of the section provides for his appointment, together with that of the vice president.)

Sec. 2d. The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States. And shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur. He shall nominate, and, by and with the advice and consent of the senate, appoint ambassadors and other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law.

Sec. 3d. He shall from time to time give to congress information of the state of the union, &c. &c. He shall receive ambassadors and other public ministers, and shall take care that the laws be faithfully executed, and shall commission all officers of the United States.

The third article provides for a judiciary.

Sec. 1st. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

Sec. 2d. The judicial power shall extend to all cases in law and equity, arising under the constitution, the laws of the United States, and treaties made, or which shall be made under their authority. In all cases affecting ambassadors, and other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, — between a state and citizens of another state, — between citizens of different states, — between citizens of the same state claiming lands under grants of different states, — and between a state, or the citizens thereof, and foreign states, citizens or subjects. But, by an amendment to the constitution, it is provided, that the judicial power shall not be considered to extend to any suit in law or equity, commenced against one of the United States by the citizens of another state, or by the citizens or subjects of any foreign state. In all cases affecting ambassadors,

other public ministers and consuls, and those to which a state shall be a party, the supreme court shall have original jurisdiction ; in all other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as congress shall make.

Art. 4th, sec. 1st. Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Sec. 3d. New states may be admitted by congress into this Union ; but no new state shall be formed, or erected within the jurisdiction of any other state ; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of congress.

Sec. 4th. The United States shall guaranty to every state in this Union, a republican form of government, and shall protect each of them against invasion ; and on the application of the legislature, or of the executive when the legislature cannot be convened, against domestic violence.

Art. 5th. This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the *supreme law of the land* ; and the judges in every state shall be bound thereby ; anything in the constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned, and

the members of the several state legislatures, and all executive and judicial officers, both of the United States, and of the several states, shall be bound by oath to support this constitution.

On a fair, open and candid examination of the articles above recited, it cannot be denied that the sovereign people of the several states, each acting for themselves, but with a reciprocal view to the acts of all, did, by the ratification of that solemn covenant, the constitution of the United States, delegate to the general government, all those powers in which the independent sovereignty of a state or nation, in the common, as well as the technical understanding of the term, consists ; and did further prohibit to the several states the exercise of those powers, and even of some other specified powers, the exercise of which by the several states might obstruct the national union intended, and the reciprocal enjoyment of national privileges, by the citizens throughout the whole. There is also by the same instrument established, an executive power, charged with the faithful execution of the laws, and a judicial power to be vested in a supreme court, and in such inferior courts as congress may ordain and establish, with a provision for rendering the judges as independent and impartial as could be devised by human wisdom. This judicial power is expressly extended to all cases in law and equity, arising under the constitution and laws of the United States, and treaties made under their authority ; and among other things, to controversies to which the United States shall be a party — to controversies between two or more states, &c.

Here we find a tribunal appointed to be a common judge

in all constitutional questions that may arise between the parties, expressly including, among others, the United States and the several states, as such parties. Nor is there any case, so arising, excepted from the authority of its decisions. And when we find it further declared by the same compact, and by the same competent authority, the sovereign people, that the constitution which embraces all its provisions in every department; and all laws made in pursuance thereof, shall be the supreme law of the land, binding on the judges of every state, notwithstanding anything in the constitution or laws of any state to the contrary; and that, not only the senators and representatives in congress, but the members of the state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support the constitution, — it would appear utterly impossible, that any rational being, capable of understanding what he reads, should maintain that each state in the Union has a constitutional right to judge for itself definitely of the constitutionality of an act of congress, and if so judged to be unconstitutional, to suspend its operation within the jurisdictional limits of the state. And yet such is the opinion maintained by Mr. Calhoun. He has not in any part of his expose examined the powers delegated to the general government, nor the powers prohibited to the states, by the constitution of the United States, declared to be the supreme law over all the states, repealing, in effect, and nullifying every claim of right, every grant of power in their several constitutions, conflicting, or not consistent with the provisions of that instrument. He has gratuitously assumed the power, and the right as remaining

in the several states, and therefore reserved to them by the amendments to the constitution. Instead of the constitution, he has reposed on several authorities, which from their weight of character, and the reasonings accompanying them, he considers to be irresistible. Although I think the constitution alone, when fairly examined, conclusive upon this subject, I will nevertheless proceed to a fair and full examination of his authorities. Let us then consider, first, what weight ought to be conceded to them as authorities, when we consider the circumstances and situation of the authors themselves; in doing which, we may briefly consider some opposing authorities,—and, secondly, consider the force of their reasonings, and the justness of their conclusions.

The origin of the two parties, and the causes of their hostility toward each other, has already been mentioned. To these causes were soon added others, of a still more exciting nature. Not long after the organization of the government of the United States under the federal constitution, the French revolution broke out. At its commencement it was hailed by all parties in this country as the dawn of liberty to Europe, and the commencement of a new and glorious era, in the progress of which they beheld, in imagination, the downfall of tyrannical and despotic governments, and the people and nations of that quarter of the globe restored to their rights, to the enjoyment of happiness under liberal institutions, all tending to the amelioration of the whole human race. But the scenes of anarchy and blood that ensued, the atrocities enacted by the leaders, who successively fell under the guillotine, to make room for their more

successful, but not less atrocious rivals, soon darkened the prospect, and disgusted, very generally, the federal party, then constituting a powerful majority ; while the anti-federal party, who soon assumed the name of democratic, and afterwards that of the republican party, fraternized with the French revolutionists, and either excused or justified all their atrocities. And when, soon after, the French nation, having formed somewhat of a more regular government, had become involved in war with the great powers of Europe, in violation of existing treaties, as well as of the known law of nations, let loose their cruisers upon the commerce of unoffending neutrals, of which the United States then had the greatest share, and were ready to sweep it from the ocean, that party still maintained their predilections, still excused or justified all those depredations, by which our merchants were robbed of millions. Our government remonstrated against these measures. The French government treated their remonstrances with contempt, and their ministers, sent to negotiate on the subject, were treated with neglect or contumeliously dismissed. Whereupon congress determined to take measures for protecting their citizens and their commerce, and placed the nation in a state of war with France. Both parties were now in the highest state of excitement, and the nation was inundated with violent and inflammatory publications, issuing from the presses on each side against their opponents. The presses of the republican party were daily uttering the vilest calumnies, replete with the most unfounded falsehoods, against the majority in congress and the principal functionaries of the government, especially against the president, Mr. Adams.

At this crisis, congress passed two acts, which added much to the excitement of parties. The one, enabling the president to send suspected aliens out of the country, commonly called the alien act; the other, an act for punishing any person who should publish, by writing, any libellous matter against the president, for any act done in the execution of his official duties, commonly called the sedition law, with a provision that any person prosecuted under the act, should have the liberty and right to prove, in his defence, on trial, the truth of the matter published. The latter act the more exasperated the party in opposition, because they foresaw that its penalties would fall wholly upon the writers and presses on their side; they therefore denounced it in no measured terms, as an usurpation of powers not granted — a palpable violation of the constitution, by abridging the freedom of the press, so solemnly and expressly guarantied by that constitution. A large majority of the people of Virginia, and consequently of their legislature, were zealously devoted to the party in opposition, and, indeed, were the life and soul of the party at that time. Such was the situation of the authors, and such the occasion of those resolutions, both in Virginia and in Kentucky. In the passage of the two acts above mentioned, according to their construction, they found the case of that deliberate, palpable, and dangerous exercise of a power not granted, in which it is assumed the several states, not the people, are the parties to the constitutional compact, and have a right, as such, to judge, and “to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the rights and liberties appertaining to them.”

These resolutions were communicated to all the other states. The legislature of Massachusetts replied to them in full, affirming the constitutionality of the laws in question, and denying the right of the several states to judge and to interpose in the manner asserted. Resolutions, in accordance with those of Massachusetts, were passed by several of the other states, not, as I believe, exceeding three or four; others passed the matter over in silence. It will not now be denied, that those who passed upon these latter resolutions were equal, in point of talents, to their opponents. At the same time, it must be acknowledged they were equally inflamed with party zeal, equally ambitious of retaining the administration of the government in the hands of this party, as were the others for obtaining it for themselves; simply, in point of authority, they stand on equal ground. The authority of Mr. Jefferson on this subject is opposed by the same objections, but which apply to him with augmented force. He stood unrivalled at the head, and was, in fact, the oracle of his party; by them destined to enjoy the first fruit of their expected triumph, by being elevated to the presidency of the United States, the great and ultimate object of his ardent ambition. But let us turn to his opinions. It is well known to the writer of this, and to all who were personally acquainted with Mr. Jefferson at the time, that his opinion upon the unconstitutionality of the sedition law, was in accordance with that of the Virginia legislature, — if he did not dictate that opinion, — he held that it was an abridgment of the freedom of the press, and was, therefore, the assumption of a power, not only not granted, but a power expressly withheld. He also held the alien law to be un-

constitutional. That his opinion on the subject of state rights was the same as that expressed in the resolutions, is evident from the citations made by Calhoun. Instead of opposing to these opinions, the opinions of the several judges of the supreme court, judicially pronounced, I will produce some of the citizens of Virginia, not less illustrious than Mr. Jefferson. Notwithstanding the great majority of the opposition party in Virginia, there was a respectable minority, who supported the measures and acts of the general government, and were wholly opposed to the opinions and doctrines expressed in the resolutions of their state legislature, and, of course, to Mr. Jefferson's opinions on the same subject. Among others, was the present Chief Justice Marshall, who was a representative from that state in the second congress, under President Adams's administration; and the well known Patrick Henry — both eminent for talents and judicial knowledge. The character of Patrick Henry, as a jurist, stood as high, and his opinion, in all matters, not affecting party interest, had as much weight as that of any man in the state, I may safely say more; certainly more than Mr. Jefferson, who, however eminent as a party politician, and for his profound knowledge in the law of nations, was not considered equally eminent as a jurist. Mr. Henry offered himself as a candidate for election for the succeeding session of the state legislature, on which occasion he published an address to the electors of the district, in which he freely expressed his sentiments of the state of parties, and of their politics. He gives it as his deliberate opinion, that the laws so much reprobated, were both constitutional, both within the powers delegated to the general government; that the power

to remove suspected aliens, in a situation like that then existing, was a necessary incident of the war power; that the sedition law in no wise abridged the freedom of the press, but applied a wholesome correction to its licentiousness; and that congress had the same constitutional power and right to provide for the punishment of false and slanderous libels on any official acts of the president, which might have a direct tendency to impair their due efficiency, as they had to provide for the punishment of an opposition, by violence, to any officer of the government, in the legal execution of his authority. He also reprobated the doctrine of state rights, as assumed in the Virginia resolutions. I will adduce one more authority, which, in my view, very much weakens, if it does not wholly destroy Mr. Jefferson's authority, as to the constitutionality of the sedition law—the authority of Mr. Jefferson himself. In his inaugural address, on entering upon the second term of his presidency, in March, 1805, after recapitulating the measures of his administration, he goes on to say: “During this course of administration, and in order to disturb it, the artillery of the press has been levelled against us, charged with whatever its licentiousness could devise or dare. These abuses of an institution, so important to freedom and science, are deeply to be regretted, inasmuch as they tend to lessen its usefulness, and to sap its safety. They might, indeed, have been corrected by the wholesome punishment, reserved to, and provided by, the laws of the several states, against falsehood and defamation; but public duties, more urgent, pressed on the time of public servants, and the offenders have, therefore, been left to find their punishment in the public indignation. Nor

was it uninteresting to the world, that an experiment should be fairly and fully made, whether freedom of discussion, unaided by power, be not sufficient for the propagation and protection of truth." After some observations on the success of the experiment, he continues: "No inference is here intended, that the laws provided by the states against false and defamatory publications, should not be enforced. He who has time, renders a service to public morals and public tranquillity, in reforming these abuses by the salutary corrections of law. But the experiment is noted to prove, that, since truth and reason have maintained their ground against false opinions, in league with false facts, the press, confined to truth, needs no other legal restraint. The public judgment will correct false opinions and reasoning, on a full hearing of all parties; and no other definite line can be drawn between the inestimable liberty of the press, and its demoralizing licentiousness."

Mr. Jefferson well knew that there were laws in every state, either enacted by statute, or adopted from the common law, for the punishment of libels, affecting characters, public and private. He also knew that the constitution of each state contained an imperative declaration, of precisely the same force and effect, though not always in the same words, as in the constitution of the United States. It is evident, therefore, that whatever might have been his former opinions, he now admitted and approved the distinction, between the freedom and the licentiousness of the press; the former of which could not be abridged, without the violation of an important constitutional right; but the latter, the licentiousness of the press, might, and ought to be restrained, by what he calls

the salutary correction of law. This concession, it is granted, although it silences the principal objection, urged at the time, against the constitutionality of the act, does not cover the whole ground. It was said to be the exercise of a power not granted, and Mr. Jefferson spoke of it as a power reserved to the states. Now it is conceded that congress, generally speaking, have not the power to punish crimes, merely as moral or civil offences. But the power of congress is necessarily, I may say expressly, extended to the punishment of all crimes that immediately and injuriously affect the government, injuriously obstruct its legitimate measures or impair its efficiency, in carrying into effect any of its constitutional powers, in any of its departments or offices.

It is true, the opinion we have just been examining, was not produced by Mr. Calhoun as an authority; but as the act of congress upon which this opinion was expressed, was the principal occasion of those resolutions, and was chiefly relied on as justifying the principles which they adopted and sanctioned, its discussion here cannot be considered altogether a digression.

We shall now proceed to examine the opinions of Mr. Jefferson, which the writer has introduced, as an authority, to support his doctrine of state rights. Nor ought we to omit the manner in which they are introduced. After having professed his strong attachment to the union of the states, he says, "With these strong feelings of attachment, I have examined with the utmost care, the bearing of the doctrine in question, and so far from anarchical or revolutionary, I solemnly believe it to be the only solid foundation of our

system, and of the union itself; and that the opposite doctrine, which denies to the states the right of protecting their reserved powers, and which would vest in the general government (it matters not through what department) the right of determining exclusively and finally, the powers delegated to it, is incompatible with the sovereignty of the states and with the constitution itself, considered as a basis of federal union." As strong as this language is, it is not stronger than that used by the illustrious Jefferson, who said — "To give the general government the final and exclusive right to judge of its powers, is to make its discretion, and not the constitution, the measure of its powers," and that "in all cases of compact between parties having no common judge, each party has an equal right to judge for itself, as well of the operation as of the mode and measure of redress." "Language," says Mr. Calhoun, "cannot be more explicit, nor can higher authority be produced."

Here Mr. Jefferson as well as Mr. Calhoun must have assumed as a first principle, that each state still retains an independent sovereignty. It is also conceded that the government of the United States, within the limits of its powers, is possessed of independent sovereignty. This being all granted, the rest follows of course — for between independent sovereignties there can be no common judge. But from an examination of the constitution of the United States, we have seen that no such independent sovereignty could have been left to the states, consistent with the powers therein delegated to the general government, and the prohibition of powers to the state governments, and the declared supremacy of that constitution, and the laws made in pursuance

of its powers. Such was the idea of those who framed, and those who adopted and ratified that constitution. On this principle, was introduced into the constitution, the article making provision for a judicial power—a tribunal to be a common judge between all the parties to the constitution, or that might become parties under its administration, and extending its jurisdiction to all cases in law and equity, arising under the constitution, the laws of the United States, and treaties made, or which shall be made under its authority. And, as if intended to put the very case under consideration, beyond all doubt, the jurisdiction of this tribunal is expressly extended to controversies, to which the United States shall be a party to controversies between two or more states—between a state and the citizens of another state, between citizens of different states, between citizens of the same state claiming land under grants of different states, and between a state and citizens thereof, and foreign states, citizens or subjects. And is there any exception to this jurisdiction, except what is to be found in an amendment to the constitution, which is in these words:—“The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.”

From a careful and attentive perusal of this, and other provisions of the constitution, it appears to me so demonstrably clear, that I can conceive no possible way of avoiding the conclusion, but by maintaining not only that each state in the very face of the constitution, still retains its independent sovereignty, but that this sovereignty is of so high

and transcendent a nature, as to defy the power of the people of each state, and of all the states united, and to render inoperative and void every act of the people, the primitive sovereignty, in any way tending to its diminution, a position which I believe would not have been assumed by Mr. Jefferson or Mr. Calhoun.

Another authority is produced from the legislature of Virginia, — it is an extract from the report of a committee, at a session subsequent to that in which the resolutions, so often referred to, was passed, explaining and justifying that resolution, and of which Mr. Calhoun says, “Were it possible to settle a question where the passions and interests of men are concerned, this point would have been long since settled forever by the state of Virginia. The report of her legislature, to which I have already referred, has really, in my opinion, placed it beyond controversy. Speaking in reference to this subject, it says, ‘It has been objected,’ (to the right of a state to interpose for the protection of her reserved rights,) ‘that the judicial authority is to be regarded as the sole expositor of the constitution; on this objection it might be observed, 1st. That there may be instances of reserved powers, which the forms of the constitution could never draw within the control of the judicial department. 2d. That if the decision of the judiciary be raised above the sovereign parties to the constitution, the decisions of the other departments, not carried by the forms of the constitution before the judiciary department, must be equally authoritative and final with the decisions of that department. But the proper answer to this objection is, that the resolution of the general assembly relates to these great and extraordinary

cases, in which all the forms of the constitution may prove ineffectual against infractions, dangerous to the essential rights of the parties to it. The resolution supposes that dangerous powers not delegated, may not only be usurped and executed by the other departments, but that the judicial department may also exercise or sanction dangerous powers, beyond the grant of the constitution; and consequently, the ultimate right of the parties to the constitution to judge whether the compact has been dangerously violated, must extend to violations, by one delegated authority, as well as another, by the judiciary, as well as by the executive or legislative."

The high opinion expressed by Mr. Calhoun of the reason contained in this report, as well as the high authority from which it comes, entitle it to a serious and candid examination. We will therefore consider the reasons offered, both separately and in connection, so far as they stand connected. The whole is intended to be an answer to the objection to the state right which we have been discussing, "That the judicial authority is to be regarded as the sole expositor of the constitution." "To this (say they) it might be observed, first, that there may be instances of usurped powers, which the forms of the constitution could never draw within the control of the judicial department."

In every part of this report there is a confusion of ideas; the want, not of a subtle and metaphysical, but an obvious and practical distinction — a distinction between the unconstitutionality and inexpediency or impolicy of an act or measure of the government. In the first case, the unconstitutionality of an act, or, as it is denominated in the report,

the usurpation of a power not granted ; the constitution itself furnishes the rule of decision. Nor can there be found a single instance of the kind, in which, by the forms of the constitution, it cannot be brought within the control of the judicial department. Not a case in which the party injured may not bring to a legal decision the question, whether the act complained of be an usurpation of a power not granted, or the exercise of a power granted by the constitution. But as to the expediency or inexpediency, policy or impolicy, of an act or measure of the government, in the exercise of a constitutional power, the constitution affords no rule of decision to a court of law, nor can it be made to afford any rule in such cases generally. The constitution has, therefore, necessarily, and I may add, wisely left questions of mere expediency and policy to the discretion of the legislative or executive department, to which the power is committed in trust. But the constitution has not left this discretion uncontrolled. It is, by the provisions of the constitution, placed under the control of public sentiment, which is exercised by the people and the state legislatures, in their elections of the president, vice-president, and the members of the national legislature, both of the senate and house of representatives. The frequency of elections, renders this control constant and powerful, and of which those, who are subject to it, can never be unmindful. If the distinction taken above be correct, of which "really in my opinion" it is impossible to doubt, the reason intended to be given in the first observation, being founded in false premises, is altogether nugatory. They proceed to observe, "secondly, that if the decisions of the judiciary be raised above the sovereign parties to the

constitution, the decisions of the other departments, not carried, by the forms of the constitution, before the judiciary, must be equally authoritative and final, with the decisions of that department."

The same distinction which was taken above, is equally applicable, and equally available here. The decisions of the judiciary are made final and conclusive on the parties, in all cases submitted to their jurisdiction, and includes all in which the constitutionality of the acts and measures of the other departments may be brought in question. But, as before observed, the expediency and policy of their acts is referred to the tribunal of public sentiment. I can, therefore perceive no more force in the reason of this observation, than in that of the first — both appear to me equally nugatory. The report then proceeds:—"But the proper answer to the objection is," (see the last paragraph of the report above recited.) This is certainly an extreme case which proves nothing; still more, it is a case that can never happen under our constitution; but, were it possible it should happen, a remedy would not be sought or obtained, by any right reserved to the states by the constitution. No constitution of government among men ever has provided, or ever can provide for a lawful resistance to its authority, without insuring a perpetual suspension or annihilation of its necessary energies, and a universal anarchy. But, it will be asked, can no lawful resistance be, in any case, made to the unconstitutional, to the tyrannical and oppressive acts of a government? As it relates to civil institutions there cannot, any farther than may be done by a resort to the constituted tribunals, among which is included that of public sentiment, a

tribunal which, under free institutions, is not the least efficacious. But in cases of violent oppression, where all constitutional remedies have been tried, and have become hopeless, a people or community, in that situation, are discharged and freed from all the duties of the constitution, the civil compact of the government, however solemnly it may have been ratified, and are thrown back upon the law of nature, the law of self-protection; that law which authorizes, nay, enjoins, as a duty, resistance to oppression, by force and by every attainable means, under the guidance of wisdom and prudence. If, in such case of oppression, any one or more of the states, or any portion of the people are roused to resistance, so far are they from acting under a constitutional right granted or reserved, that they have assumed the exercise of their natural rights, in defiance of the constitution. On a candid review of this subject, let me ask, what has become of those irresistible reasons which, in the opinion of Mr. Calhoun, have settled the question and placed it beyond controversy? Gone — vanished into thin air. That this is not perceived and acknowledged, is principally to be attributed to passion and interest. But the delusion one may well believe, could not have been so long and so obstinately persisted in, had it not been supported by that confusion of ideas already mentioned, and which is so prominent a feature in all Mr. Jefferson's theories of our government; and indeed of all the zealous defenders of the independent sovereignty of the several states, and their consequent state rights, — and is not less conspicuous in the speculations of Mr. Calhoun. It seems to have lain like an incubus on his mind, benumbing his faculties of discernment, and bewildering his imagination in whatever relates to this subject.

I ought not here to omit another precedent taken from the same authority — the legislature of Virginia, at a subsequent period, when the fumes of party excitement had passed away and left the mind open to the light of truth, and the convictions of reason. It is a precedent which, in my opinion, neutralizes, as far as relates to the great constitutional question under discussion, all the former precedents that have been produced, and dissipates all those weighty reasons which, in the opinion of Mr. Calhoun, has settled the point forever, and placed it beyond controversy. It is contained in the following extract from Governor Tyler's message to the legislature, and the proceedings of the two houses thereupon.

From Governor Tyler's Message.

December 4, 1809. — “A proposition from the state of Pennsylvania is herewith submitted with Governor Snyder's letter accompanying the same, in which is suggested the propriety of amending the constitution of the United States, so as to prevent collision between the government of the United States and the state governments.

House of Delegates, Friday, December 15, 1809. — “On motion ordered that so much of the governor's communication as relates to the communication from the governor of Pennsylvania on the subject of an amendment proposed by the legislature of that state, to the constitution of the United States, be referred to Messrs. Peyton, Otey, &c.

Thursday, January 16, 1810. — Mr. Peyton, from the committee to whom was referred that part of the governor's communication, which relates to the amendment proposed

by the state of Pennsylvania, to the constitution of the United States, made the following report : — The committee, to whom was referred the communication of the governor of Pennsylvania, covering certain resolutions of the legislature of that state, proposing an amendment to the constitution of the United States, by the appointment of an impartial tribunal, to decide disputes between the states and the federal government, have had the same under their consideration, and are of opinion, that a tribunal is already provided by the constitution of the United States, to wit., the supreme court, more eminently qualified from their habits and duties, from the mode of their selection, and from the tenure of their office, to decide the disputes aforesaid, in an enlightened and impartial manner, than any other tribunal which could be created.

The members of the supreme court are selected from those in the United States, who are most eminent for virtue and legal learning, not at the will of a single individual, but by the concurrent wishes of the president and senate of the United States. They will, therefore, have no local prejudices and partialities, the duties they have to perform lead them necessarily to the most enlarged and accurate acquaintance with the jurisdiction of the federal and state courts together, and with the admired symmetry of our government. The tenure of their office enables them to pronounce the correct opinions they may have formed, without fear, favor or impartiality. The amendment to the constitution, proposed by Pennsylvania, seems to be founded upon the idea, that the federal court will, from a lust of power, enlarge their jurisdiction to the total annihilation of the

power and jurisdiction of the state courts ; that they will exercise their *will* instead of the law and constitution. This argument, if it proves anything, would operate more strongly against the tribunal proposed to be erected, which promises so little, than against the supreme court, which for the reasons given before, have everything connected with their appointment calculated to insure confidence. What security have we, were the proposed amendment adopted, that this tribunal would not substitute their will and their pleasure in place of the law ? The judiciary are the weakest of the three departments of government, and least dangerous to the political *rights* of the constitution ; they held neither the purse nor the sword, and even to enforce their own judgments and decisions, must ultimately depend on the executive arm. Should the federal judiciary, however, unmindful of their weakness, unmindful of their duty, which they owe to themselves and their country, become corrupt, and transcend the limits of their jurisdiction, would the proposed amendment oppose even a probable barrier to such an improbable state of things. The creation of a tribunal, such as is proposed by Pennsylvania, so far as we can form an idea of it, from the description given in the resolutions of the legislature of that state, would, in the opinion of your committee, tend rather to invite than to prevent collisions between the federal and state courts. It might also become, in process of time, a serious and dangerous embarrassment to the operations of the general government. Resolved, therefore, that the legislature of this state do disapprove of the amendment to the constitution of the United States, proposed by the legislature of Pennsylvania. Resolved, also,

that his excellency the governor, be, and he is hereby requested to transmit forthwith, copies of the foregoing preamble and resolutions to each of the senators and representatives of this state in congress, and to the executives of the several states in the union, with a request that the same be laid before the legislatures thereof." The reports, with the resolutions, having passed through the usual forms, were agreed to unanimously, both by the house of delegates and by the senate. Any comment on this precedent is unnecessary; it speaks for itself, in a language too intelligible to be misunderstood or perverted.

The writer, however, still considers his reasons, and those of his authorities to be unanswerable. He proceeds to say, "Against these conclusive arguments as it appears to me, it is objected, that if one party has a right to judge of infractions, so has the other, and that, consequently, in a case of contested powers, between a state and the general government, each would have a right to maintain its opinion, as in the case when sovereign powers differ in the construction of treaties, or compacts; and that, of course, it would come to be a mere question of force. The error is in the assumption that the federal government is a party of the national compact." This is an assumption, which, I believe, has never been made; nor can I suppose any could ever conclude that any government ever was, or ever could be, a party, in any sense of the word, to the compact, by which it was created, and brought into existence. Indeed, when the compact is completed, the government still exists in idea only; it is a mere abstract entity, until arranged, and then, though incapable of becoming by retrospect, a party in its own produc-

tion, yet is it now capable of acting and of being a party, in cases which may arise between itself and any of its constituents, or others, according to the nature and extent of the original compact. But he says, "The states, as has been showed, formed the compact, acting as sovereign and independent communities." Answer — It has been shown, and so is the fact, that the government of the several states, in the character of independent sovereigns, submitted each to the sovereign people of the state, as the only competent authority, and from whom they severally derived and held the sovereign power in trust, the execution and ratification of the federal compact, the constitution of the United States. It is the act, and in fact the sole, though concurrent act, of the people of each state. And by the same act, by which they declared the constitution and laws of the United States, and treaties made under its authority, to be the supreme law of the land—that the judges in the several states should be bound thereby, anything in the constitution of any state to the contrary notwithstanding; and that the members of the several state legislatures, and all executive and judicial officers shall be bound by oath or affirmation to support that constitution, they reduced, as they had competent authority to do, the independent sovereignty, which each state had before possessed, to a limited sovereignty, intended to harmonize with that superior, though, in many respects, limited sovereignty, which that act conferred on the general government. Of all this, not a fact can be denied, nor the conclusion from those facts, as it appears to me, without at the same time, denying all existence of principles, and force of reason. It is however immaterial in what character the several states

acted on that occasion. The question is, in what character they now stand; what character was fixed upon them by the sovereign people, which, and no other, they still continue to sustain. What that character is, we have seen clearly demonstrated; yet he goes on to say, "The general government is its creature, (of the compact,) and though in reality a government, with all the rights and authority which belong to any other government, within the orb of its power, is nevertheless a government, emanating from a compact between sovereigns, and partaking in its nature and object, of a joint commission, appointed to superintend and administer the interests in which all are jointly concerned, but having, beyond its proper sphere, no more power than if it did not exist." There is indeed a certain degree of analogy between the case he puts, of a joint commission, and that of the general government. The commissioner, or agent, we may call him, is appointed to manage the joint concerns of the principals, and has no authority to bind them beyond the powers they have given. The general government is constituted with certain powers, to be exercised within certain limits; if the government exceed those powers, or, rather, if it does not adhere to, and pursue those powers agreeably to the true construction of the constitution, its acts are void; they are not binding on the principals, whether we consider the people, the states, or both to be principals. Here the analogy ends. Contests may sometimes arise between the commissioner or agent, and his principals, whether he has exceeded his powers, but more frequently between third parties and the principals. In neither of these cases, however, have the principals a right to decide for themselves in the last resort.

The parties may compromise, but the compromise must be mutual. If they still persist, the final resort must be to a court of law—a court, not established by the compact, but by the laws of the country. Very different is the case of the general government. In that solemn compact, the constitution of the United States, as has been already pointed out, there is established a judicial power, which expressly embraces in its jurisdiction, all cases that can arise between the general government and any and all the parties to the compact, relating to the constitutional exercise of its powers, and the binding force of its acts; with the provision of an executive power to carry the decisions of the judiciary into final effect. Without this provision of an adequate judiciary and executive power, it would have been nothing more, perhaps something less, than a joint commission. With it, it is a government with all the attributes of sovereignty, within the limits of its powers. It must, therefore, be seen at once, that the analogy sought fails in all the essential points; that the argument built upon it is deceptive, and the conclusions wholly fallacious. Had the writer taken his analogy from any of the state governments, it would have extended much further, and, indeed, to every essential point; but the conclusion would have been wholly the reverse.

In the next paragraph he again endeavors to support himself by authority, "That this doctrine is applicable to the case of a contested power between the states and general government, we have the authority, not only of reason and analogy, but of the distinguished statesman already referred to. Mr. Jefferson, at a late period of his life, after long experience and mature deliberation, says, "With respect to

our state and federal governments, I do not think their relations are well understood by foreigners. They suppose the former subordinate to the latter ; this is not the case ; they are cöördinate departments of one single and integral whole. But you may ask, if the two departments should claim the same subject of power, where is the umpire to decide between them. In cases of little urgency, or importance, the prudence of both parties will keep them aloof from the questionable ground ; but if it can neither be avoided nor compromised, a convention of the states must be called to ascribe the doubtful power to that department which they may think best." It is certainly not surprising that foreigners should not well understand the relation existing between our state and federal governments ; but it is not a little surprising that so distinguished a statesman as Mr. Jefferson, after long experience and mature deliberation, should not have understood them, or understanding, should not, when he sat down to correct the erroneous opinions of others, have been able to express his own in clear and intelligible language. It is true, there is some degree of difficulty in defining those relations, which never before existed in the government of any nation. No words, no names had, therefore, been appropriated to express those relations — none are to be found in any political writer, or in any treatise on government now extant. Words and names may be found, having some analogous signification ; but the analogy will always be discovered to be more or less remote : so that unless a writer on the subject is very careful to define the precise meaning he intends to express by them, he will often involve his meaning in obscurity, or lead others, if not himself, into

erroneous conclusions ; and such is evidently the case with Mr. Jefferson in this instance. He tells us the relation between the state and federal governments, is that of coördinate departments of one integral whole — of one whole and complete government. As no qualifying or defining epithet is here introduced, the expression ought to be understood in its common or appropriate signification, which indeed are here the same. When we speak of coördinate powers generally, it is understood that the coöperation of the powers, two or more, are necessary to produce a given effect. In perfect analogy to this, the word coördinate is applied to departments of government. If the coöperation of all the departments, acting separately, be necessary to the validity of their acts, their powers are said to be coördinate, and they are appropriately denominated coördinate departments. So fixed is the meaning of the expression, that this departure of Mr. Jefferson, if a different meaning was intended, is, I believe, the first to be found in the English language.

Of these coördinate departments we have examples, as well in our own governments, as in that of Great Britain. Both in our general and state governments, the legislative branch is divided into two departments at least, consisting of a senate and a house of representatives, who deliberate and act separately, but must both concur in the same act to give it validity. The British parliament, the legislative branch of that government, is divided into three departments, or, as they are often denominated, the three estates of the realm, with coördinate powers. The king constitutes one department, the house of lords another, and the house of commons a third ; and, to the validity of all and every

legislative act, each of these coördinate departments must concur.

Certainly nothing can be found in any article, section, or expression of the constitution, to justify the application of the term coördinate departments to the relations thereby established between the state and general governments, in its appropriate sense. Nor can it be made to consist with the declaration, that the constitution and laws of the United States shall be the supreme law of the land. The state governments, as such, are not by the constitution admitted to any voice, either positive or negative, in the adoption of those laws, or authorized finally to decide on their validity, either by themselves, or by their highest legal tribunals. I think Mr. Jefferson could not be supposed, in this instance, to have used the term in its appropriate sense. The original meaning of the epithet coördinate, taken singly, is, of equal, or the same order, rank, or degree; as two counts, an order of nobility, are said to be of coördinate rank, without reference to power or coöperation. But, taken in this sense, of an equality of rank, to any practical purpose, between the governments, it appears to me to be irreconcilable with the decided supremacy of the constitution and laws of the general government. It does not support the general conclusion, which seems intended to be drawn; nor does the instance put, serve to illustrate his position, nor to support Mr. Calhoun's doctrine of state rights. Mr. Jefferson gives an instance of what, he would have us believe, is an exercise of coördinate powers; or, perhaps we should rather say, of the remedy to be obtained, through the means, or in consequence of, the relation subsisting between the

state and general government, which he believes to be correctly expressed by calling them coördinate departments of one integral government. In this instance, I think he has been altogether unfortunate. He raises an objection by way of question: "But you will ask if the two departments should claim the same subject of power, where is the umpire to decide?" His answer is clearly intended to illustrate his proposition, by obviating the objection: "In cases of little urgency or importance, the prudence of both parties will keep them aloof from the debatable ground; but if it can neither be avoided nor compromised, a convention of the states must be called, to ascribe the doubtful power to that department it shall think best." What is here understood by the subject of power? Is it person, or property, or any matter or thing on which the power may be exercised? or is it the purpose or object to be attained, or both? Taken in either sense, if there may be a possible, there is certainly no necessary conflict, arising from the simultaneous exercise of the same power, by any or all the states and by congress. Congress has the power to lay and collect taxes through all the states. Each state has the same power, within the limits of its jurisdiction. The subjects to be assessed or taxed, are the same with both. In the case of a direct tax, persons and property; of indirect taxes, as an excise, all excisable articles. The power has been often so exercised by both without a suspicion of collision. Still, there may arise an inconvenience. These double exactions may, in their amount, press too hard on the contributors; but public sentiment, under the joint influence of national and state interests, in consideration of the exigencies on each side,

and brought to bear alike on both parties, will soon find a remedy for the inconvenience. One or both will soon be induced to relax their exactions; or one wholly to remit, and resort to other sources of revenue. We may adduce another case, in which the power of both governments may be brought, and frequently have been brought, to bear on the same subject, and for an object in many respects the same, in other respects different, but perfectly concordant. This is the case of internal improvements; a power to promote which has been, and still is, exercised by the general government, as a constitutional power, and with the approbation of a great majority of the people, and of the states. As internal improvements in general, such as canals and railroads, must, for the most part, be made within the limits of a state, the state power must be first brought to bear on the subject, as the state alone has the power and the right of taking private property, for public use, against the will of the owner, making him a proper compensation, without the exercise of which no canal or railroad, or indeed any other road could be made, and carried through, if at all, without immense sacrifices. The state legislature will make the necessary provision, as they find it for the interest of the state, and may direct the road or canal to be made for the use and at the expense of the state, or they may grant them to a company or companies, incorporated for that purpose, always subject to the laws and regulations of the state alone. Congress may now, if they view the object of sufficient national importance, and to concern the general welfare, bring their power to bear on the subject, by advancing money to the state or company, on loan, or by a subscription for

shares in the company stock. This will be done, however, only on application to congress by the state, or by the company. In the first case, that of taxation, each party exercises its power, independent and distinct from the other; in the latter case, the state exercises its power, as principal, the general government as auxiliary. The object of the state is its own welfare, not excluding the general welfare. The object of congress is the general welfare, including that of the state. In none of these cases do we find the shadow of a coördinate power, or any collision of powers. There are, indeed, some acts, generally prohibited, which a state may nevertheless perform, with the consent of congress. But this consent is a permissive act, of which the state may avail itself or not. It is not a concurrent act, as in case of coördinate powers or coördinate departments, in the appropriate sense of the term; nor, in the other sense of the expression, does it make anything in favor of equal powers.

We will however suppose such conflicting claim to have arisen between congress and the several state governments. What does Mr. Jefferson intend by the expression, "if it cannot be avoided or *compromised*?" Should congress exercise the power, or one or more of the states, it becomes a question of constitutional right—a case arising under the constitution and laws of the United States, and can be constitutionally decided by the constitutional tribunal, the national judiciary only. It is not a case for a compromise. Congress cannot alter the constitution, by surrendering or abridging any of their legitimate powers; nor can the several state governments, of their own accord, surrender any right reserved to them in that sacred instrument, by the sovereign

people. Although there is but one mode, that just referred to, of settling the present right of the parties, yet is there another mode provided for settling its exercise for the future, by an amendment to the constitution, which may assign the right to one party or the other, with such modifications and limitations as shall be deemed most conducive to the general welfare, or wholly prohibit its exercise. Such provision is found in the fifth article of the constitution, "The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to the constitution, or on the application of the legislatures of two-thirds of the several states, shall call a convention of the several states, for proposing amendments, which in either case shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress."

Mr. Jefferson had undoubtedly a reference to such convention, a convention to be called, on the application of the legislatures of two-thirds of the several states; for we cannot suppose that he contemplated, in this instance, any innovation of the constitution. Although this convention was to have the power only of proposing amendments, thereafter to be referred, for ratification, to the states, in one or other of the modes which congress might propose. On the whole, we need not hesitate to say, that he has not given a proper, or satisfactory answer to the objection he had raised, nor an answer tending in the least to strengthen or to illustrate his proposition.

I shall presently attempt to explain the relation actually existing between the state and general governments, and the provisions of the constitution intended to harmonize the general and particular interest. But, as I have hitherto, after stating the writer's doctrine of state rights, confined myself principally to an examination of his authorities, on which he places so profound a reliance, and their reasons, fully expressing, as he tells us, his own, and which he has considered as unanswerable, I will return to a brief examination of his own reasoning, the theory on which, according to him, the constitution rests.

He begins with saying: "It has been said by one of the most sagacious men of antiquity, that the object of a constitution is to restrain the government, as that of the laws is to restrain individuals. The remark is correct. Nor is it less true, where the government is vested in a majority, than where it is in a single or a few individuals, a republic than a monarchy or aristocracy. No one can have a higher respect for the maxim, that the majority ought to govern, than I have, taken in its proper sense, subject to the restrictions imposed by the constitution, and confined to subjects in which every portion of the community have similar interest; but it is a great error to suppose, as many do, that the right of a majority is a natural and not a conventional right, and therefore absolute and unlimited. By nature every man has the right to govern himself; and government, whether founded on majorities or minorities, must derive their right from the assent, expressed or implied, of the governed, and be subject to such limitations as they may impose. Where the interests are the same, that is, where the same laws that will benefit

one will benefit all, it is just and proper to place them under the control of the majority ; but where they are dissimilar, so that the law that may benefit one portion may be ruinous to another, it would be unjust and absurd to subject them to its will ; and such I conceive to be the theory on which our constitution rests."

The theory exhibited in this passage, is, except in one or two instances, certainly correct, although, like most of all theories, it may be misapplied, as I think it has been in this case. The exception is, to the distinction taken for granted between natural and conventional rights, as though the former were absolute and unlimited, the latter not. There is in fact, no such thing among human beings as an absolute and unlimited right, whether it be called natural or conventional. All rights are relative ; they are suggested by existing social relations, and are consummated, modified, and limited by convention ; that is, by the general, but for the most part tacit consent of the society. An isolated individual, excluded from all possible relation to society, all knowledge of social relations, could have no right, nor even the conception of a right, in any proper sense of the term. He would have the power of uncontrolled action within the limits assigned by his nature, the power of doing what he pleased. This is not the exercise of a right, but of a faculty. The right of self-government, which it is said every man has from nature, is, therefore, not absolute and unlimited. It is by that very assent which is necessary to its existence, subjected to modifications and limitations. The actions of the individual are, in that respect, subject to prohibitions and even compulsion. It is the right and duty of the community, in any existing

state of things, to prohibit all those actions of the individual that have a direct tendency to injure the society, and to compel him to make those proportionate contributions that are found necessary to support and advance the general interest — the good of the whole. As all rights are social, so are they also conventional; but they are not therefore opposed to natural rights. Nothing more can with propriety be meant by natural rights than that they are approved by the laws of nature. Nor can anything more be understood by the laws of nature, than those rules of human or social conduct, which reason and experience have discovered to be generally beneficial to man, in the relations which he sustains agreeably to his constitution, as established by his Creator. It is not true in any practical sense, that any rule of the law of nature is absolute and unlimited — that it is binding, under all circumstances, admitting no exceptions. That which the law of nature approves and enjoins in certain circumstances and relations of society, it disapproves and prohibits in others. Were it not so, all social improvements must have been prohibited to mankind, by the laws of his nature.

The rule, that the majority shall govern, was considered by those who formed and by those who ratified the constitution, as a rule already established. It had the sanction of immemorial usage; it was the established rule in every legislative, in every public body through the country. But they considered it to be capable of exceptions; and they introduced exceptions, in all the cases where they thought a greater degree of unanimity ought to be required. Thus in the senate, it is made necessary that two-thirds of the mem-

bers present should give their assent to a treaty — and the same majority of two-thirds is necessary to conviction on impeachment. It is also provided, that a bill objected to by the president, shall not become a law unless it shall be re-passed by a majority of two-thirds of both houses. That the majority of two-thirds of both houses shall agree in making proposals of amendments of the constitution by congress. In the application to congress, it is required that two-thirds, and in the ratification of amendments three-fourths of the states should concur. These are the only exceptions expressed, and being expressed, every exception by inference merely is excluded. The assertion, that where the interests are dissimilar, so that the law that will benefit one portion, may be ruinous to another, it would be unjust and absurd to subject them to the will of a majority, is too unqualified, and moreover implies an extreme case, which proves nothing. In every community, where the members are intelligent and enterprising, there must necessarily be a great diversity or dissimilarity of interests, arising from different pursuits, but all contributing more or less to the same end, and the sum total of which will constitute the general interest; that is, the interest of the majority. If there be found an interest that contributes nothing to the general interest, it can demand no more than common protection; but if it be detrimental, if hostile to the general interest, it would be unjust and absurd to encourage it; nay, justice to the community would require that proper measures should be adopted to discourage it, and put an end to its pursuit. Indeed, in a well regulated society, very few, I believe I may venture to say none, will be found to engage

in, or certainly, long to pursue an interest that in its nature, or the nature of the means necessary to support it, is so inflexible that it cannot be brought to accord with the public interest, and even to promote it.

The writer having, as he assumes, established by the authorities adduced, as well as by his own reasoning, the right of a state, by its legislature, to nullify or suspend within the limits of its jurisdiction, any law of the general government, which they shall judge to be unconstitutional, or what he considers the same thing, to come in conflict with some great interest of the state, proceeds to give us the reason why such provision should be made in a government like ours, and its absolute necessity to the preservation of the union. We are told a similar provision was found in all the most famous governments of antiquity, particularly of Sparta and of Rome; that it was with them the great preservative principle of liberty, and to which is justly attributed their stability, their long endurance and prosperity; that in modern times we have a conspicuous example in the British government, in the three coördinate departments of that government, constituted of the monarch, the aristocracy or lords, and the commons or representatives of the people. The different interests of these orders are of rank, and consist of powers, prerogative privileges and rights claimed by each, and often coming in conflict with each other. When these orders are deemed necessary to the continuance of the government, each order must necessarily be vested with a power to protect its own rights and privileges, and this can be done in no other way than by vesting them with coördinate powers, rendering the concurrence of all and each,

necessary to the validity of every law or general measure of the government; so that any one of the orders can, by a simple non-concurrence, protect itself against any law or measure, which may be supposed injuriously to affect its interests. "Happy for us," he says, "we have no artificial and separate classes of society. We have wisely exploded all such distinctions, but we are not on that account exempt from all contrariety of interests, as the present distracted and dangerous situation of our country, unfortunately, but too clearly proves. With us they are almost exclusively geographical, resulting mainly from difference of climate, soil industry and productions, but are not therefore less necessary to be protected by an adequate constitutional provision, than where the distinct interests rest in different classes. The necessity is, in truth, greater, as such separate and dissimilar geographical interests are more liable to come into conflict, and are more dangerous, in that state than those of any other description." One prominent error of the writer, and which affects all his reasonings on the subject, is, that he considers all different and dissimilar interests as coming into conflict or opposition with each other, while I believe, that under our institutions, no two or more interests, the pursuit of which can lawfully be permitted, considered in a political, civil or moral view, are ever necessarily opposed, or have any necessary tendency to opposition. On the contrary, when rightly understood, (and men, unless under some high excitement or temporary delusion, will readily understand what is for their benefit,) it may, with the utmost confidence, be asserted that there is a general harmony of all such interests. As for instance, between

the agriculturist and the manufacturer. The agriculturist, whether his products consist of raw material, as cotton, flax, hemp or wool, or of articles of subsistence, as beef, pork, butter, cheese and bread stuffs, is deeply interested in the success and prosperity of the manufacturer, the greater his demand on the agriculturist for the materials of his manufacture and the means of subsistence, a demand for those articles which must mostly perish on hand, or cease to be produced ; and the more ready, cheap and abundant will be his supply of the articles and implements necessary to any advantageous pursuit of his business, or that contribute to the necessities, comforts and conveniencies of life. Nor is the manufacturer less deeply interested in the success of the agriculturist, which secures to him a more cheap and abundant supply of the necessary means of subsistence, and the materials of his manufacture, while the success of both unite in the public prosperity. Nor can it affect the real mutuality of the interests, whether they reside in the same or in different geographical divisions of the country, between which there is a free commercial intercourse. It is thus that the cotton manufacturers of the north, including all the manufacturers and agriculturists of that region, have a steady interest in the success of the cotton planters of the south, from whom alone they can expect a supply of cotton, the important material in their manufacture, the duty of three cents per pound on foreign cotton imported, amounting to a prohibition. And surely the cotton planter is equally interested in extending his market, by furnishing a steady supply to the increasing demand of the manufacturers. Indeed, it is nothing short of a paradox to assert, that the dif-

ference of climate, soil, industry and productions in the different states, or geographical divisions of the country, should create different and dissimilar interests in the sense of the writer. As to the proof of a contrariety of interests to be found, as he tells us, in the present distracted and dangerous state of the country, it is a proof of a contrariety of opinion, which on the part the writer has espoused, appear to me, as they do to a majority of two-thirds, if not three-fourths of the states, as baseless as are his opinions which have been examined on the great constitutional question.

To proceed with his system of self-protection, to be vested in the several states, and his reasons why there ought to be such a provision: He tells us that a constitutional provision of the right of self-protection, in the case of separate and dissimilar geographical interests, is more necessary than in the case of difference of ranks, as such interests, according to his assertion, are more liable to come into conflict, and are more dangerous in that state, than those of any other description. We are told, "So numerous and diversified are the interests of our country, that they could not be represented in a single government, organized so as to give each great and leading interest a separate and distinct voice, as in the governments to which I have referred. A plan was then adopted, better suited to our situation, but perfectly novel in its character. The powers of government were divided, not as heretofore, in reference to classes, but geographically. One general government was formed for the whole, to which was delegated all the powers, supposed to be necessary to regulate the interests common to

all the states, leaving others subject to the separate control of the states, being, from their local and peculiar character, such that they could not be subject to the will of the whole Union, without the certain hazard of injustice and oppression. It was thus that the interests of the whole were subjected, as they ought to be, to the will of the whole, while the peculiar and local interests were left under the care of the states separately, to whose custody only they could be safely confided. This distribution, to which all the states are parties, constitutes the peculiar character and excellence of our political system; it is truly and emphatically *American, without example or parallel.*" The intention of the writer, in this paragraph, is to show, that the framers of the federal constitution had, at the time, a clear view of his separate, dissimilar, and unavoidable conflicting interests, arising from the geographical causes he has assigned, and the necessity of providing for each geographical division, or, which is the same thing, each state, the separate interests of which might be, as it was then supposed, injuriously affected by any law of the general government, the power and right of self-protection. He has not asserted, though his manner of expression seems to imply it, that the division was made with a view to the present government. It existed in the several colonies, long before they became independent states, before any conception of a national union. Nor does he assert, nor will he venture to assert, that any such express provision is to be found in the constitution. But that it is to be inferred from the supposed views and intention of the framers, and from what he considers the necessity of the case. And where are we to find the proof of this inten-

tion? Not a hint is to be found in any expression of the constitution; not a hint in the journals and debates of the general convention, nor in the debates of the several state conventions, who ratified the constitution, as far as they have been published; not a hint in any of the amendments that have since been adopted. On the contrary, it was the general complaint of the opponents, that the constitution left the several states powerless; it left them neither the power nor the right of protecting themselves against any stretch of power by the general government. It was not only said that the states were degraded from their sovereignty, but, in a strain of exaggeration, they were declared to be reduced to the humble grade of corporations, existing at the pleasure of the general government, and soon to be swallowed up in the vortex of its power; and although these complaints and the objections they contained were fully answered on the other side, yet was there not an attempt to obviate them by a hint of a provision for this self-protecting power, either express or implied, in the general constitution, or in the modified constitution of the several states. Of all this Mr. Calhoun could not have been ignorant, although he might not have called it to mind while writing. With respect to some further observations which he has made, on the division of powers, I shall have further occasion to speak. I think we have given sufficient specimens of his reason for the introduction of this system of self-protection. Let us now attend to the system itself; the manner in which it is to be exercised, for the attainment of its object, and its final consequences to the government. It will be recollected that the right of self-protection is supposed to be derived to each state from its

independent sovereignty, which it is asserted still remained, and is reserved to the several states, or at least a portion of that sovereignty sufficient for the purpose, notwithstanding the delegation to the general government of all those powers, in which national sovereignty consists, and the prohibition to the several states of the exercise not only of those powers, but of such other powers of domestic, or, as it may be properly denominated, municipal sovereignty, as, it was believed, might, under the influence of sectional prejudices, or an undue preponderance of sectional interests, prove detrimental to the interests of the whole, interrupt the national harmony, and the reciprocal enjoyment of national privileges among the citizens of the several states, in their intercourse with each other.

The consequence of this supposed reservation of power is, that, as all sovereign and independent states are equal among themselves, in power and rights, each state must have a power coördinate with that of the general government, and with the several co-states. These powers, however, are not as in the several departments of the British government, to be coördinate in their exercise. No state is permitted a voice in the passage of an act by the general government. When the act has been passed, and has become the supreme law of the land, then, and not till then, the protective power may be interposed. If any one of the states shall judge the law to be injurious to its separate interests, or a dangerous infraction of the national compact, which, according to the doctrine laid down, as the state is to be its own sovereign judge, or, which will always be the same thing, it has the right of interposing its *veto*, to suspend the operation,

or, in more modern phrase, to nullify the obnoxious law within the limits of its jurisdiction, the limits of the state ; so that the state may be said to have a recusant rather than a concurrent voice ; and this act of the state is a constitutional, and therefore a peaceable act — an appeal to the co-states, instead of an appeal to force, the usual resort of sovereigns. He says, “ The states themselves may be appealed to, three fourths of which, in fact, form a power, whose decrees are the constitution itself, and whose voice can silence all discontent. The utmost extent then is, that a state acting in its sovereign capacity, as one of the parties to the constitutional compact, may compel the government, created by that compact, to submit a question, touching its infraction, to the parties who created it.”

We are not here told, by what authority, or in what manner the general government are to submit the question to the parties, that is to the states, for a decision ; but as to the manner we must suppose from several expressions, and from the approbation with which he has introduced the authority of Mr. Jefferson on a similar subject, it is to be by calling a general convention of the states. But no single state, with all its sovereignty, has any right, any power, to compel congress to assume a power not delegated by the constitution. That instrument has conferred on congress no power to submit any question touching its infractions, either to a convention or to the states themselves. So far from this, it has, as has been already shown, very explicitly referred all questions of this kind to the constituted tribunal, the judiciary of the United States. If any power, delegated or reserved, shall be found to be oppressive or unequal in its operation, or

liable to abuse, a remedy is provided by an amendment of the constitution, limiting, modifying, or wholly expunging such power. But such amendment must be proposed and ratified in the mode and manner prescribed by the constitution, and no other. For the sovereign people have prescribed modes and limitations to the exercise of their own power, as well as that of their rulers ; the manner in which, by whom, and for what purposes, it shall be called into action. Whether they are to exercise it by themselves, by their representatives in convention, or in their legislative assemblies. The mode of exercising the power of amending the constitution, and the authorities of the several acting parties, from the inception to the final ratification of the amendments proposed, are definitively pointed out and limited ; particularly the power of the general convention, the convocation of which is authorized alone by the fifth article of the constitution, as already recited, is limited to the sole object of proposing amendments. And surely the writer will not venture to assert, that there is in this article, or in any other article of that instrument, any provision or hint of a provision for the calling of a general convention for any other purpose or object. Will it then be contended that necessity makes a law for itself ? That the state power exists from necessity, that hence from necessity is derived the state right of self-protection — the right of suspending an obnoxious law of the general government, in the nature of an appeal to the states, the original parties to the constitution, that the same necessity will legitimate the calling of a general convention to decide on the appeal, and authorize the convention to make the decision and furnish the means of compelling the parties,

in which the general government is included to abide the decision? Certainly not, by Mr. Calhoun. He would instantly perceive that such a doctrine would insure a speedy dissolution of all civil institutions; although he does not perceive that the doctrines which he is advocating would equally insure a dissolution of the union.

We will, however, suppose all difficulties surmounted, and a convention of the states meet to decide the appeal, could an impartial decision be expected? Public opinion continuing the same, the same majority would be found in the convention in support of the law, which had prevailed, in its passage by congress — and the final decree, instead of being a dove to silence discontent, would serve only to cherish discord, and administer food to party discontent. And yet we are very gravely and zealously assured, that such are the only means that have been, or can be devised for the preservation of the union of the states. On a candid review of the whole subject, it is extremely clear that, if the power and the right contended for, remained on the adoption of the constitution, and was reserved to the several states, it was something that wholly escaped the discernment of those who framed, or those who ratified that instrument, as well as those who prepared, and those who ratified the subsequent amendments — and it is clear that the doctrine of state rights so zealously advocated by Mr. Calhoun, has no foundation in the constitution, in reason or common sense.

Before I proceed to examine Mr. Calhoun's opinion on the constitutionality and the effects of the tariff, in which I shall be very brief, I will endeavor to define, or rather to delineate the relations as they exist between the general and the state

governments. There is, as before observed, a want of appropriate terms, that renders it less easy to express, than to conceive those relations. In developing these relations we shall make the constitution our guide, but to a correct understanding of all the provisions of that instrument, and their several bearings, it will be necessary to take a concise view of the constitution that preceded it, the old confederation, its prominent defects, the causes of failure, the evils intended to be remedied and the great end to be attained. On the declaration of independence in July, 1776, the colonies, now states, assumed, severally, the powers and character of independent sovereignties, independent states. They had, from the commencement of the revolutionary contest, acted in concert in the common cause, under the direction of a congress, consisting of delegates from the several colonies, whose authority was merely that of influence, supported by the necessity of united efforts against their common and powerful enemy. In this situation it was clearly perceived by all, that in order to their success in the struggle, and to place them on a respectable footing with the nations of the earth, among whom they were taking a station, a closer and lasting union must be formed, and a general government established, with sufficient power and authority to act, and to transact the common concerns of the whole as a nation. Accordingly the old confederation was formed, approved and ratified by the several states, acting respectively in their characters of independent sovereigns. The first article merely declares the style of the confederacy to be "The United States of America." The second article declares that "each state retains its sovereignty, freedom and inde-

pendence, and every power, jurisdiction and right which is not by this confederation expressly delegated to the United States in congress assembled." Article 3d. "The several states hereby enter into a firm league of friendship with each other for their common defence, the security of their liberties, and their mutual and general welfare." In determining questions in congress, as all independent sovereigns are equal in dignity, however unequal in other respects, each state was to have one vote. For the more convenient management of the general affairs of the United States, delegates were to be annually appointed in such manner as the legislature of each state should direct, to meet in congress on a certain day in every year. The power stipulated in this league to be conferred on congress, were, in many respects, the same as were afterwards delegated to the general government by the constitution of the United States, and gave the confederation, on paper, the semblance of a government; withholding, however, those powers, without which all other powers are merely nominal; and the grant of these essential powers was withheld, because they could not consist with the independent sovereignty of the several states. Congress was not provided with a judiciary or an executive. All their acts, as well as the articles of confederation, were subject to the interpretation of the legislatures, and judicial tribunals of thirteen independent states; and for carrying their measures into effect, they were dependent on the good pleasure of the legislatures, and executives of these same sovereign states. They had the power of making treaties, but not the power of fulfilling any stipulations on their part. They had power of declaring war, but had the command of no resources to

maintain a war. They had no power to raise a revenue, the power of laying or collecting taxes of any kind, direct or indirect. Their power went no farther than to ascertain the amount necessary to be raised for the public service, and apportion it among the several states according to a rule prescribed, with a request that each should raise its respective quota, which each, as an independent sovereignty, might choose or refuse at pleasure; and which was in fact often refused or neglected with impunity. It is true, congress were empowered to borrow money, and emit bills on the credit of the United States, but without the command of funds to pay the one or redeem the other. They issued their acts which they denominated ordinances; they never ventured to give them the name of laws; for what property of a law has an act that all and every of the parties may obey or not, at its sovereign will and pleasure. It is true, that the pressure of the war and the patriotic zeal of the citizens in a common cause, in which their all—life, liberty, and property was at stake, supplied, in some degree, the want of power in congress. In addition to this, a fortunate concurrence of circumstances in the political world, enabled congress to engage in the cause of the country some of the most powerful nations of Europe, to triumph in the event of the contest, and to obtain from Great Britain a full acknowledgment of the sovereignty and independence of the United States. But no sooner was the war ended, and peace restored to the country, than the evils of this imbecile system of confederation were fully developed, to the astonishment of many and the regret of all. The credit of the United States was sunk to the lowest ebb, and with it that of the in-

dividual states, involving in the same ruin all credit, all confidence, both public and private. The scenes of perplexity and distress that followed throughout the country, pressing on the very verge of anarchy, are remembered by many still surviving, and are well known to all conversant in the history of those times.

The experience acquired from observation of the failure of the system of federal union, the causes of the failure, and the consequences that followed, disclosed the necessity and suggested the plan of an energetic national government. The plan thus suggested was afterwards matured and successfully adopted in forming the constitution of the United States. At the time of forming the constitution, each of the states was possessed of the full and complete sovereignty, embracing both the national and the domestic, or, with more propriety, the municipal sovereignty, within its limits. It was deemed desirable or indispensable, that the separate states should still retain and exercise, under their respective constitutions, the municipal or local sovereignty, subject to no interference or control of the general government, except in some few instances, in which such exercise might endanger a conflict with the general interest. And it was deemed equally indispensable to any practical national union under a general government, that all the powers which constitute independent national sovereignty, should be transferred from the several states and vested in such government; without which it must prove equally inefficient with the nominal government under the confederation. There is no reservation to the states of that sovereignty and independence, nor is it expressly denied to them; indeed, the expression

"sovereignty and independence," or even the word "sovereign," or "sovereignty," is not to be found in that instrument. The term seems to have been purposely avoided; perhaps because it was thought not to be applicable, under our institutions, to the internal relations of either the general or state governments, in the absolute sense in which it is used by English statesmen and jurists. They define it to be an absolute, uncontrolled, and uncontrollable, arbitrary, and despotic power, which must necessarily exist in every government, wherever it may be lodged. And in that government they placed it in their parliament, the three estates of the realm. This, however, is not true of that government in practice, whatever may be the theory. It is there, by the forms of the constitution, placed under the constant and powerful control of public sentiment. With us it is expressly limited by our constitution, which subjects it not only to the tribunal of public sentiment, but to the legal control of an independent judicial tribunal, whose interpretations of the constitution, and their decisions on the constitutionality of the laws are final and conclusive. It was, therefore, probably deemed safer to enumerate the powers delegated to the general government, and the powers withheld or limited on the one hand, and the powers limited, modified, or prohibited to the several states, on the other, without expressing the result in either case, by a term or terms which might lead to a doubtful or erroneous construction.

The United States, as a nation, are sovereign and independent. This sovereignty is, by the constitution, vested in the general government. In their relations with foreign

powers, in their intercourse with independent nations, the sovereignty is absolute and independent, in the sense of the law of nations, which places all sovereign states on the same footing ; but in its relations to the people, and to the local or state governments, it is a limited sovereignty ; and although its laws are declared to be supreme, they are supreme within the limits only prescribed by the constitution. In this view of the subject, the several states may be said to be sovereign, but not independent. Each is still in possession of sovereign power, but it is a limited sovereignty, adapted to the superior sovereignty of the national government. The sovereignty of the several states is local, confined in each within its local limits. It is wholly municipal in its character, and embraces those local concerns and interests only, which were considered as not having a national character, or not to affect the general interest of all, as forming a national whole. Thus, while the general government is vested with supreme authority, in all matters that involve the general welfare of the Union, considered in a national view, the state governments, within the limits of their respective jurisdiction, retain as sovereign all those powers, which, in their due administration, must endear the social state to mankind. To them, among their own citizens respectively, it belongs to regulate the mode of acquiring, and to secure the acquisition of property ; to cherish and protect all the social relations ; to provide for an equal administration of justice ; to promote the means of education, and facilitate the diffusion of useful knowledge through all classes ; to animadvert upon morals, and punish those crimes which attack private property, violate personal security, or in any manner disturb

the peace of the community. Each of the several states may be said to be independent, in the exercise of the municipal sovereignty, in one sense, that no power external to the state has a right of interference, or to control it while exercised within the limits as prescribed; but not in the usual and appropriate sense of sovereign and independent; because, among other things, certain limits are set to that sovereignty, as it relates to the general government, which the state governments are forbidden to exceed, and of which the constitution of the United States has made the former government the sole guardian, and the sole judge of the excess. What is conclusive on this subject, if anything can be so, is, that the right of final decision, in all cases arising under the constitution and laws of the United States, and treaties made under its authority, in all cases to which the United States shall be a party, either with a state or its citizens, in all controversies between two or more states, or in which a state shall be a party, is vested in the general government, through the proper department, the judiciary of the United States. Nor is there a single instance, in which a state is, by the constitution, permitted to judge for itself, in any question relating to the powers or acts of the general government — a right necessarily incident to the sovereignty and independence of a state, and without which no such independence can exist. As has before been observed, the constitution and laws of the United States are declared to be the supreme law of the land, and binding on all the judges in every state, notwithstanding anything to the contrary in the constitution or laws of any state; and all the functionaries, all the officers of the several states, legisla-

tive, executive, and judicial, are required to be bound by solemn oath to support the constitution of the United States, that is, to support the government in all its constitutional acts, in all its departments. Each and every state, with their several governments, is therefore bound by the same solemn obligation. A state or a government without functionaries, by whom it may be administered, is a mere abstract entity, incapable of energy, incapable of action. It is a self-evident truth, that the obligation of the state or government is identical with that of its functionaries. The several states are therefore bound by all the constitutional acts of the general government, but that government is not bound by the laws of any state, or of every state, should each with all solemnity enact the same thing. I am here speaking of the ordinary powers of legislation, which belong to the state governments, not of the extraordinary powers of legislation, which belong to the sovereign people only; and which is employed solely in enacting, altering, or amending the constitution of the state governments, and has no bearing on the present subject. I say, the general government is not bound by a state law; they are indeed bound to respect the laws of the several states, not transcending the bounds of their municipal sovereignty, as it respects the constitution of the United States, so far as not to interpose any control; but this is totally different from an obligation to obey the law. The general government is bound, on application of the legislature, or the executive of a state, as the case may be, to assist in suppressing any insurrection against its authority; but this is the obligation of an auxiliary, which supposes no superiority on the one side or the other. Somewhat

different is the case, where a state cannot act without the permission of the general government. It indicates a superiority in that government. It is true the permission is not compulsory on the state, but it is compulsory on the state not to act without the permission.

On the closest scrutiny we may then repeat the assertion, that the power of the national government, constitutionally administered, has, whenever it comes in contact with the acts of the state governments, a declared superiority. We nowhere find those relations of equality which Mr. Jefferson has in effect asserted in denominating them coördinate departments. It is true, the general and the state governments were intended to include the whole government of the country, and to each was assigned its part. The former constituted the national government, vested with the national sovereignty, and charged with the national interest of the whole. The latter, the state governments, were local, vested severally with the municipal sovereignty within their respective limits, and all united under one national government. The state governments were, as we have seen, placed in due subordination to the general government in all those matters and those only which were deemed to be of general concern, and to embrace the interest of the whole as one nation. This was not left to the arbitrary discretion of either. The powers and rights of each are limited and adjusted by the constitution itself. Without all this the general government would certainly have a strong resemblance to a joint commission, to which it is compared by Mr. Calhoun; but a commission of a peculiar kind, in which any of the parties should have a right reserved to disavow any act of the com-

missioners, and withdraw himself, or to dissolve the compact at his pleasure. There is, however, one provision in the constitution, on which Mr. Jefferson seems to have mainly relied, as the foundation of his two coördinate departments, although according to his construction, if it proves anything, it proves the superiority of one of the departments — that consisting of the several states — but it is very clear that it proves nothing to the purpose ; for the question is, not what may be at some future period, but what at present are the existing relations between his departments, not what the constitution may be, but what it is. Mr. Jefferson seems to have caught his idea on the subject from the recollection of a general convention, to be called, without any distinct recollection of the purpose for which alone its call is authorized. It is not, as before observed, to decide what are the constitutional powers of the general government, or the right of the several states as subsisting at the time ; but to recommend what they should be at a future period by proposing amendments of the constitution to this effect. If any amendments are so proposed, they are to be referred for ratification to the sovereign people, acting either by their representatives in convention, to be called in the several states, or by their representatives in the several state legislatures, and in the latter case the representatives act not in the character of ordinary legislators, but in the character, and exercising the extraordinary powers of the people, which they have reserved to themselves over the constitution, from whom it originated. And if the amendments proposed are finally ratified, the ratification is the voice of the sovereign people of each state, in concurrence with the voice of the

people of all the states, or at least of three-fourths of all the states. When the people have thus ratified, or shall have rejected the proposed amendments, the power is executed, and becomes dormant. No portion of it remains to the several states, or any of them. All that remains is the right of again calling it into exercise in the mode and in the manner prescribed. It is evident, therefore, that this reservation of power to the people, not to the states or state governments, as such, is wholly misapplied by Mr. Jefferson as well as by Mr. Calhoun and his party in favor of state rights.

There are too objections, deemed by the advocates for state sovereignty and independence, which ought at least to be briefly noticed. 1st, That to give the general government, through whatever department, the sole right to judge of its own powers, is to reduce the several states from independent governments to the subordinate grade of corporations, existing at the will and pleasure only of that government. 2d, That to make the powers of the general government, for any purposes or within any limits, superior to the state governments, is to make the creature greater than the creator. As to the first objection, it has often either been thrown out *ad captandum vulgus*, or has been taken up and maintained without due consideration. A corporation is the mere creature of the superior government, from which it derives its existence, and is dependent for its powers, and for its continuance, on the laws of the government. Not so the state governments, even admitting all the powers vindicated for the general government. In no sense do they derive their existence or their powers from that government; nor

are they dependent on its laws for their continuance, or the exercise of their rightful powers within the limits of their several jurisdictions. The general government and the several state governments derive their existence and all their powers from the same legitimate source of power, the sovereign people. The government of each state derives its powers from the act of the people, within its local limits, and the general government from the concurrent act of the people of all the states ; and the people still retain, in the same sovereign capacity, the right to change and limit the powers of both or either, and so to adjust them, as shall be deemed most conducive to the general good. One thing which gives the greatest security to the state governments, and to state rights is, that the members of congress are elected, in a certain ratio, by the people of each state from their own citizens, and for short periods, so that they are held constantly accountable for their public conduct to their constituents. As to the second objection, it is held as a general truth, that the creature cannot be made greater than the creator. In what sense does this apply to government ? The sovereign people create the government, for the very end that it should rule over them : the people instituting the government. But is the sovereignty of the people natural or conventional ? It is so far natural, as it has its origin in the social nature of man. But in the order of nature individuals are first ; they are the constituent parts of society. Being ever so many persons together, from different parts of the world, so long as each individual or each family, shall continue to live separately and independent of each other, they cannot be said to constitute a people : that they may constitute a people, it is

necessary they should become associated, either by express or by tacit consent. Then, and not till then, they become a people, and capable of acting as such. But in that state they cannot act without some point of union, without some power instituted or assumed to concentrate their actions—otherwise, there will be but a chaos of individual actions, discordant as the individual wills; in this way only can the people be brought to act efficiently.

It has been shown, that society is the necessary, and even the natural state of man; and that civil government is necessary to man in society. In that sense civil government is a dictate of nature, and is agreeable to the laws of nature; but the institution is left to man in his social state. In that state every people have the sole right of choosing and forming their own institutions of government, of varying, changing and adopting them to their different situations, in the progress of social and civil improvements. How these institutions have been introduced by tacit consent in the early stages of society, and become binding by the force of custom, need not be here repeated. We will advance at once to that state of social and civil improvements, in which the people have entered into an express civil compact, or written constitution, forming and organizing a government for themselves, instituting, limiting and directing its necessary powers to the end intended; providing for the selection and appointment of the functionaries to administer those powers in the several departments, and the manner in which they shall be held accountable for their conduct in the administration. In thus forming and establishing their government, the people act in their sovereign capacity, and in that capa-

city are the source of all power in government. But they have provided, that this their sovereign power shall thereafter remain dormant, until again called into action upon the same subject, the constitution, and that only on the occasions, and in the manner which they have prescribed. In the mean time it is, as it were, non-existent. The government thus instituted and administered, agreeably to the provisions of the constitution, is made supreme over the people, who now no longer act as such, but as individuals, subordinate to the government by their own consent. There is, therefore, no absurdity in the case, that the people should, one and all, become subject in their individual capacity to the government, which they have instituted or created in their united and aggregate capacity. Indeed, if we reject this reasoning, we must necessarily resort to the doctrine of the divine right of sovereignty; nothing short of this can establish the authority of any government. This reasoning applies as well to the several states under the government as to people under a government of a more simple form; for let the several states be considered as parties to the compact, forming the constitution of the general government, each state was undeniably made a party by the act of the sovereign people of the state, the government of which is the creature of that people, and the act of the government or state, if so empowered to act, is in effect the act of the people and binding only as such. If, then, the people of the several states have, themselves, or through the agency of their several governments, by concurrent act created another government, that government is the creature of the whole, as the government of each state is the creature of its separate and

distinct people ; and each people have the power over the creature they have made, and the right to place it in such relation to the creature, made by the whole as they may please, and in such degree of subordination, and for such purposes as they shall deem most conducive to their interests, and the interests of all the parties. Surely this is not to make the creature greater than the Creator, but directly the contrary. I will add, that the subordination of the several states to the national government is only *quoad hoc*, within the limits of the powers given to that government, and to the end for which those powers were given. If I could find another word in the language less offensive to state pride than the word *subordinate*, thus qualified, to express the relation in which the state governments stand as it respects the general government, I should readily have adopted it ; but I can find none that will so correctly express that relation as it is determined by the constitution ; and I consider it as a matter of great consequence to form a correct opinion upon the subject.

In respect to the constitutional question, Mr. Calhoun says, " In order to understand more fully the difficulty of adjusting this unhappy contest on any other ground, it may not be improper to present a general view of the constitutional objections, that it may be clearly seen, how hopeless it is to expect that it can be yielded by those who have embraced it. They believe that all the powers vested by the constitution in congress, are not only restricted by the limitation imposed, but also by the nature and object of the powers themselves. Thus, though the power to impose duties and imposts be granted in general terms without any

other express limitation, but that they shall be equal, and no preference shall be given (by any regulation of commerce or revenue) to the ports of one state over those of another, yet as being a portion of the taxing power, given with the view of raising revenue, it is, from its nature, restricted to that object, as much so, as if the constitution had expressly so limited it, and that to use it to effect any other purpose, not specified in the constitution, is an infraction of the instrument, in its most dangerous form, an infraction by perversion, more easily made and more difficult to resist than any other. The same view is believed to be applicable to the power of regulating commerce as well as all the other powers." This does not differ materially from the rule of construction adopted by the supreme court, as laid down in Sergeant's Constitutional Law: "In the constitution of the United States, the powers of government are restricted to certain objects, and the incidental powers restricted to such as are necessary, (that is, expedient) to the powers expressed." This is certainly correct as a general rule; the principal difficulty is found in making a correct application of the rule in specific cases.

In the present case it becomes an important question, what is the nature and object of the taxing power, and the power to regulate commerce? What was intended to be comprehended in the terms and expressions used, in the grant of those powers, by the framers of the constitution? For it will, and must be conceded, that these articles ought now to be understood as they were then understood, and construed, to embrace the objects then supposed and intended to be embraced in them as they are expressed. Mr. Calhoun's

objection seems to be this, that a power given by the constitution is restricted in all cases solely to the object of that power. If the object be not expressed, we must look for it in the nature of the power. If we mean by the nature of the power its fitness for a certain purpose, or for the attainment of a certain object, then the nature of the taxing power consists in that fitness—its fitness for raising a revenue. This is the principal and substantive object; but is it necessarily confined to this object? Suppose there is found in it also a fitness to become an auxiliary to some other principal powers, to afford the necessary and proper means for attaining the object of that power, does the former belong to its nature, the latter not? These observations apply forcibly to the two powers of which we have been speaking. The power to regulate commerce it is conceded contains a grant, although not expressed of all the incidental powers necessary and proper to carry the principal powers into effect—a command of the means necessary and proper to the attainment of its object. These means have been found in the power of taxation granted as a principal power for the purpose of revenue. The government have constantly used these means in regulating commerce, by imposing duties for the purpose of retaliating or counterruling restrictions, on our trade by foreign nations. I will mention but one instance—the duty on foreign tonnage. But let us examine the subject a little more closely, and in detail. As before suggested, in order to ascertain correctly the extent of the powers granted, we must ascertain how the terms and expressions used in the grant, were understood by the framers of the constitution. For in that sense and no other, ought they now to be under-

stood. At the time of forming and adopting the constitution, the regulation of commerce by duties and imposts, or in other words, by means of a tariff, had become familiar to the people of this country. It had been in use for ages in the English nation, from whom we are descended, and from whom we have derived our language, our legal, civil, political and commercial vocabulary. With them the numerous duties laid for the protection of trade, the encouragement of manufacture, and of every branch of domestic industry, have been in the language of parliament, of all their statesmen and writers on political economy, ever denominated regulations of commerce. The disputes between the colonies and the mother country, who claimed the right of regulating their commerce, and of imposing taxes and duties, not only as the means of enforcing such regulations, but for the purpose of raising a revenue, rendered the terms "regulation of commerce" and to regulate commerce, familiar to the people of this country, and that in connection with the imposition of duties as the necessary means. And this connection had become settled and fixed in the general mind by the frequent and repeated agitation of the subject in the public papers of the times, and in all public bodies throughout the colonies; and the more so, as the colonists took a distinction between duties imposed upon them, for the purpose of regulating their commerce with the mother country, including the protection and encouragement of her manufactures, and those duties that were imposed merely for the purpose of revenue. The former they allowed to be constitutional, as the necessary concomitant of a constitutional power, the power to regulate commerce; the latter they denied. In this con-

nection the term was understood and used by the framers of the constitution of the United States, as we are assured by Mr. Madison, who was a member, and one of the most efficient members of the general convention. And certainly his personal knowledge on the subject, his general information on whatever relates to our government, render him the most competent judge; and his reputation for integrity the highest authority now living. By him we are informed, that the power to regulate commerce was then understood by all to unite with it a power to protect and encourage domestic manufactures, by a tariff of duties, and was one prominent view with which it was inserted in the constitution. We further find by unquestionable documents, that such was the view taken of it in the state conventions, as appears from their debates, as far as they have been made public. It was a powerful argument in favor of adopting the present constitution, by which was given up that power before vested in the several states, which, from a want of concert, had been found wholly ineffectual; so that if they were deceived in this, if the power was not transferred to the general government, it no longer existed anywhere in the union—an instance not to be found in any other nation on earth. Such also was the understanding of the first congress under the present constitution, and which was composed of many who had been members of the general and the state conventions, that formed and adopted the constitution. Among the first which they passed was one in execution of this power, an act imposing duties, and reciting in the preamble that those duties were laid, among other things, for the purpose of protecting manufactures. Nor does it appear, from the journals

or debates published at the time, that there arose even the surmise of an objection to the prominent assertion of the power, so made, in its first exercise by congress. Not a session has since passed without some question being agitated upon the subject. Various objections have, from time to time, been urged against the policy or expediency of particular duties, or of the protection to be afforded to certain branches of manufactures—and in some instances to the general policy. But I cannot find that any objection was ever made to the right until 1820, more than thirty years from the commencement of its exercise, when, for the first time, on a tariff question then under discussion, the constitutional power and right of congress on this subject was denied, though but feebly supported. The strong opposition that has since continued, was not formed until 1824. It is worthy of remark, that the members in congress from the southern states, particularly from South Carolina, were, almost to a man, zealous supporters of the tariff of 1816—and none more prominent, or who brought to the subject more talents than the present writer, Mr. Calhoun. The act which was then passed, and principally through that influence, was the entering wedge of the present tariff system. But he now excuses himself by saying, that the constitutional question was not raised or discussed at that time. This is undoubtedly true. But it is strange, passing strange, that, to a statesman of his comprehensive mind and acknowledged talents, the unconstitutionality of this power in exercise, which now appears to him so prominent, should never have occurred before.

To enlarge further on this point is unnecessary. It does

appear to me that the reasons here exhibited have established, in its fullest extent, the constitutional power of congress on this subject, and, to use a language equally strong, with that of the writer, if it be possible for reason to settle a question where the passions and interests of men are engaged, it has forever settled the point, and placed it beyond the reach of controversy.

Extracts from the journals of the first session of the first congress, and selections from the debates on the first tariff act, passed on the fourth of July, 1789.

DUTY ON STEEL.

“Mr. Lee moved to strike out this duty; observing that the consumption of steel was very great, and essentially necessary to agricultural improvements. He did not believe any gentleman would contend, that enough of this article, to answer consumption, *could be manufactured* in any part of the union; hence it would operate as an oppressive, though an indirect, tax upon agriculture; and any tax, whether direct or indirect, upon this interest, at this juncture, would be unwise and impolitic.”

“Mr. Tucker joined the gentleman in his opinion, observing, that it was impossible for some states to get it but by importation from foreign countries. He conceived it more deserving a bounty to increase the quantity, than an impost which would lessen the consumption and make it dearer also.”

“Mr. Clymer replied, that the manufacture of steel, in America, was rather in its infancy; but as all the materials necessary to make it were the produce of almost every state

in the union, and as the manufacture *was already established and attended with considerable success*, he deemed it prudent to emancipate our country from the manacles in which she was held by foreign manufacturers. A furnace in Philadelphia, with a very small aid from the legislature of Pennsylvania, made three hundred tons in two years, and now makes at the rate of two hundred and thirty tons annually, and with a little further encouragement, would supply enough for the consumption of the union. He hoped, therefore, gentlemen would be disposed, under these considerations, to *extend a degree of patronage to a manufacture which*, a moment's reflection would convince them was highly deserving protection."

"*Mr. Madison*, thought the object of selecting this article to be *solely* the encouragement of the manufacturer, and not revenue; for on any other consideration, it would be more proper, as observed by the gentleman from Carolina, (Mr. Tucker,) to give a bounty on the importation. It was so materially connected with the improvement of agriculture and other manufactures, that he questioned its propriety *even on that score*. A duty would tend to depress many mechanic arts in the proportion that it protected this; he thought it best to reserve this article to the non-enumerated ones, where it would be subject to a five per cent ad valorem."

"*Mr. Fittsimons*. Some states were, from local circumstances, better situated to carry on the manufacture than others, and would derive some little advantage on this account in the commencement of the business. But laying aside local distinctions, what operates to the benefit of one

part, in establishing useful institutions, will eventually operate to the advantage of the whole."

"Suppose five shillings per hundred weight was imposed, it might be, as stated, a partial duty, *but would not the evil be soon overbalanced by the establishment of such an important manufacture? — a great and principal manufacture for every agricultural country*, but particularly useful in the United States."

ON BEER, ALE AND PORTER.

"Mr. Fitzsimons meant to make an alteration in this article, by distinguishing beer, ale and porter, imported in casks, from what was imported in bottles. He thought this manufacture was highly deserving of encouragement. If the morals of the people were to be improved by what entered into their diet, it would be prudent in the national legislature *to encourage* the manufacture of malt liquors. The small protecting duties laid in Pennsylvania had a great effect towards *the establishment of breweries*; they no longer imported this article, but, on the contrary, exported considerable quantities, and, in two or three years, with the fostering aid of government, would be able to furnish enough for the whole consumption of the United States. He moved nine cents per gallon."

"Mr. Lawrence seconded the motion. He would have this duty so high as to give a decided preference to American beer; it would tend also to encourage agriculture, because the malt and hops consumed in the manufacture were the produce of our own grounds."

"Mr. Sinnickson declared himself a friend to this manufacture, and thought if the duty was *laid high enough to*

effect a prohibition, the manufacture would increase, and of consequence the price be lessened. He considered it of importance, inasmuch as the materials were produced in the country, and tended to advance the agricultural interest."

"Mr. Madison moved to lay an impost of eight cents on all beer imported. He did not think this sum would give a monopoly, *but hoped it would be such an encouragement as to induce the manufacture to take deep root in every state in the union*; in this case, it would produce the collateral good hinted at by the gentleman from New Jersey, which, in his opinion, was an object well worthy of being attended to."

ON CANDLES.

"Mr. Fitzsimons moved to lay a duty of two cents on all candles of tallow, per pound."

"Mr. Tucker observed, that some states were under the necessity of importing considerable quantities of this article, while others had enough, and more than enough, for their own consumption; therefore the burden would be practically borne by such states."

"Mr. Fitzsimons. The manufacture of candles is an important manufacture, and far advanced towards perfection. I have no doubt but, in a few years, we shall be able to furnish sufficient to supply the consumption for every part of the continent. In Pennsylvania we have a duty of two pence per pound; and under the operation of this small encouragement the manufacture has gained considerable strength. We no longer import candles from Ireland or England, of whom, a few years ago, we took considerable quantities; the necessity of continuing those encouragements

which the state legislatures have deemed proper, exists in a considerable degree; therefore it will be politic in the government of the United States to continue such duties till their object is accomplished."

"Mr. Boudinot apprehended, that most states imported considerable quantities of this article from Russia and Ireland; he expected they would be made cheaper than they could be imported, if a small encouragement was held out by the government, as the materials were to be had in abundance in our country."

"Mr. Lawrence thought that if candles were an object of considerable importation, they ought to be taxed for the sake of obtaining revenue; and if they were not imported in considerable quantities, the burden upon the consumer would be small, while it tended to cherish a valuable manufacture."

ON COAL.

"Mr. Bland, of Virginia, informed the committee that there were mines opened in Virginia, capable of supplying the whole of the United States; and if some restraint was laid on the importation of foreign coal, these mines might be worked to advantage. He thought it needless to insist upon the advantages resulting from a colliery, as a supply for culinary and mechanical purposes, and as a nursery to train up seamen for a navy. He moved three cents a bushel."

ON HEMP.

"Mr. Moore declared the southern states were well calculated for the cultivation of hemp, and, from certain circumstances, well inclined thereto. He conceived it the duty of

the committee to pay as much respect to the encouragement and protection of husbandry, (the most important of all interests in the United States,) as they did to manufactures."

"Mr. Scott stated a fact or two; being, perhaps, as well acquainted with the western country as any member of the committee. The lands along the frontiers, he could assure the committee, were well calculated for the cultivation of this plant; it is a production that will bear carriage by land better than any other, tobacco not excepted. He believed an encouragement of the kind now moved for, would bring, in a year or two, vast quantities from that country, at little expense, to Philadelphia, even from the waters of the Ohio; the inhabitants expect some encouragement, and will be grateful for it."

"Mr. White. — If the legislature take no notice of this article, the people will be led to believe it is not an object worthy of encouragement, and the spirit of cultivation will be damped; whereas, if a small duty only was laid, it might point out to them that it was desirable, and would induce an increase of the quantity."

"Mr. Moore. — By the encouragement given to manufactures, you raise them in price, while a competition is destroyed, which tended to the advantage of agriculture. He thought the manufacturing interest ought not to stand in the way of the other; but, as the committee had agreed to give it encouragement, he hoped the other would receive its share of legislative support."

"Mr. Burke thought it proper to suggest to the committee, what might be the probable effect of the proposed measure, in the state he represented, (South Carolina,) and

the adjoining one, (Georgia.) The staple products of that part of the Union were hardly worth cultivation, on account of their fall in price; the planters are therefore disposed to pursue some other. The lands are certainly well adapted to the growth of hemp, and he had no doubt but its culture would be practised with attention. Cotton is likewise *in contemplation among them*, and, if good seed could be procured, *he hoped it might succeed*. But the low, strong rice lands would produce hemp in abundance; many thousand tons, even this year, if it was not so late in the season. He liked the idea of laying a low duty now, *and encouraging it* against the time when a supply might be had from our own cultivation."

ON GLASS.

"Mr. Carroll moved to insert window and other glass. A manufacture of this article was begun in Maryland, and attended with considerable success; if the legislature were to grant a small encouragement, it would be permanently established. The materials were to be found in the country in sufficient quantities to answer the most extensive demands."

ON PAPER.

"Mr. Clymer informed the house, that the manufacture of paper was an important one; and, *having grown up under legislative encouragement, it will be wise to continue it.*"

ON WOOL CARDS.

"Mr. Ames introduced wool cards, with observing that they were manufactured to the eastward, as good and as cheap as the imported ones."

"Mr. Clymer mentioned that, in the state of Pennsyl-

vania, the manufacture was carried to great perfection, and enough could be furnished to supply the demand. A duty of fifty cents per dozen was imposed on wool cards."

"Mr. Bland, of Virginia, thought that very little revenue was likely to be collected on the article of beef, let the duty be more or less ; and, as it was to be had in sufficient quantities within the United States, *perhaps a tax, amounting to a prohibition, would be proper.*" It was rejected, as totally unnecessary, "nothing being to be apprehended from rivalry."

ON MANUFACTURED TOBACCO.

"Mr. Sherman moved six cents, *as he thought the duty ought to amount to a prohibition.* This was agreed to."

No. VII.

LETTER

FROM GOV. CHITTENDEN TO GEN. WASHINGTON,

UPON THE

POLICY AND COURSE OF VERMONT

IN THE

REVOLUTIONARY WAR.

L E T T E R .

STATE OF VERMONT.

Arlington, Nov. 14, 1781.

SIR, — The peculiar situation and circumstances with which this state, for several years last past, has been attended, induces me to address your Excellency, on a subject which nearly concerns her interests, and may have its influence on the common cause of the states of America. Placing the highest confidence in your Excellency's patriotism in the cause of liberty, and disposition to do right and justice to every part of America, (who have by arms supported their rights against the lawless power of Great Britain,) I herein transmit the measures by which this state has conducted her policy, for the security of its frontiers; and, as the design and end of it was set on foot, and has ever since been prosecuted on an honorable principle, (as the consequences will fully evince,) I do it with full confidence that your Excellency will not improve it to the disadvantage of this truly patriotic, suffering state; although the substance has already been communicated by Capt. Ezra Hicock, employed by Major General Lincoln, by your Excellency's particular

direction, and who arrived here with the resolutions of congress of the seventh day of August last, which appeared in some measure favorable to this state. I then disclosed to him the measures this state had adopted for her security, which I make no doubt has by him been delivered your Excellency. And though I do not hesitate that you are well satisfied of the real attachment of the government of this state to the common cause, I esteem it, nevertheless, my duty to this state, and the common cause at large, to lay before your Excellency, in writing, the heretofore critical situation of this state, and the management of its policy, that it may operate in your Excellency's mind, as a barrier against clamorous aspersions of its numerous (and, in many instances, potent) adversaries. It is the misfortune of this state to join on the frontier of Quebec, and the waters of the Lake Champlain, which affords an easy passage for the enemy to make a descent with a formidable army on its frontiers, and into the neighborhood of the several states of New York, New Hampshire, and Massachusetts, who have severally laid claims, in part or in whole, to this state, and who have used every art which they could devise to divide her citizens, to set congress against her, and, finally, to overturn the government, and share its territory among them. The repeated applications of this state to the congress of the United States, to be admitted into the federal union with them, upon the liberal principles of paying a just proportion of the expenses of the war with Great Britain, have been rejected, and resolutions passed, *ex parte*, tending to create schisms in the state, and thereby embarrass its efforts in raising men and money for the defence of her

frontiers, and discountenancing the very existence of the state. Every article belonging to the United States, even to pickaxes and spades, has been by the commissioners ordered out of this state, at a time when she was erecting a line of forts on her frontiers. At the same time the state of New York evacuated the post of Sheensborough, for the avowed purpose of exposing this state to the ravages of the common enemy.

The British officers in New York, being acquainted with the public disputes between this and the claiming states, and between congress and this state, made overtures to Gen. Allen, in a letter, projecting that Vermont should be a colony under the crown of Great Britain, endeavoring, at the same time, to draw the people of Vermont into their interest. The same day Gen. Allen received this letter, (which was in August, 1780,) he laid it before me and my council, who, under the critical circumstances of the state, advised that no answer, either oral or written, should be returned, and that the letter be safely deposited till further consideration: to which Gen. Allen consented. A few months after, he received a second letter from the enemy, and the same council advised that Gen. Allen should send both letters to congress, (inclosed in a letter under his signature,) which he did, in hopes that congress would admit Vermont into union; but they had not the desired effect.

In the fall of the year 1780, the British made a descent up the Lake Champlain, and captured the forts George and Ann, and appeared in force on the lake. This occasioned the militia of this state, most generally, to go forth to defend it. Thus the militia were encamped against the enemy

near six weeks, when Gen. Allen received a flag from them, with an answer to my letter, dated the preceding July, to Gen. Haldemand, on the subject of an exchange of prisoners. This flag was delivered to Gen. Allen, from the commanding officer of the enemy, who were then at Crown Point, with proposals for a truce with the state of Vermont, during the negotiating the exchange of prisoners. Gen. Allen sent back a flag of his to the commanding officer of the British, agreeing to the truce, provided he would extend the same to the frontier parts of the state of New York, which was complied with, and a truce took place, which lasted about three weeks. It was chiefly owing to the military prowess of the militia of this state, and the including the state of New York in the truce, that Albany and Schenectady had not fell a sacrifice to the ambition of the enemy that campaign.

Previous to the retreating of the enemy into winter quarters, Col. Allen and Maj. Fay were commissioned to negotiate the proposed exchange of prisoners. They proceeded so far as to treat with the British commissioners on the subject of their mission, during which time they were interchangeably entertained with politics, which they treated in an affable manner, as I have been told, but no cartel was settled; and the campaign ended without the effusion of blood.

The cabinet council, in the course of the succeeding winter, finding that the enemy in Canada were about seven thousand strong, and, that Vermont must needs be their object the ensuing campaign, circular letters were therefore sent from the supreme executive authority of

this state to the claiming states before-mentioned, demanding of them to relinquish their claims to this state, and inviting them to join in a solid union and confederation against the common enemy. Letters were also sent to your Excellency and to the states of Connecticut and Rhode Island; any [one] of these letters stated the extreme circumstances of this state, and implored their aid and alliance, giving them withal to understand, that it was out of the power of this state to lay in magazines and support a body of men sufficient to defend this state against the force of the enemy. But to those letters there has been no manner of answer returned.

From all which it appeared that this state was devoted to destruction by the sword of the common enemy. It appeared to be the more unjustifiable that the state of Vermont should be thus forsaken, inasmuch as her citizens struck the first offensive blow against British usurpation by putting the continent in possession of Ticonderoga, and more than two hundred pieces of cannon, with Crown Point, St. John's, and all Lake Champlain; their exertions in defeating General Carleton in his attempts to raise the siege of St. Johns; their assisting in penetrating Canada; their valor in the battle at Hubbenton, Bennington, and the landing near Ticonderoga; assisting in the capture of General Burgoyne, and by being the principal barrier against the power of the enemy in Canada ever since.

That the citizens of this state have, by nature, an equal right to liberty and independency with the citizens of America in general cannot be disputed, and that they have merited it from the United States, by their exertions with them, in

bringing about the present glorious revolution, is as evident a truth as any other which respects the acquired right of any community. Generosity, merit and gratitude, all conspire in vindicating the independence of Vermont; but notwithstanding the arguments which have been exhibited in sundry pamphlets in favor of Vermont, which have been abundantly satisfactory to the impartial part of mankind, it has been in the power of her external enemies to deprive her of union, confederation, or any equal advantage in defending themselves against the common enemy. The winter being thus spent in fruitless attempts to form alliances, and no advantages were procured in favor of this state, except that Massachusetts withdrew her claim on condition that the United States would concede to the independence of Vermont; but that if they would not, they would have *their* smack at the south end of its territory; still New York and New Hampshire were strenuously opposed to the independence of Vermont, and every stratagem in their power to divide and subdivide her citizens were exerted, imagining that their influence in congress, and the certain destruction (as they supposed) of the inhabitants of this state by the common enemy, could not fail of finally accomplishing their wishes.

In this juncture of affairs, the cabinet of Vermont projected the extension of their claim of jurisdiction upon the state of New Hampshire and New York, as well to quiet their own internal divisions occasioned by the machinations of those two governments, as to make them experience the evils of intestine broils, and strengthen this state against insult. The legislature accordingly extended their jurisdiction to the eastward of Connecticut River to the old Mason

line, and to the westward to Hudson River. But in the articles of union referred the determination of the boundary lines of Vermont and the respective claiming states, to the final decision of congress, or such other tribunal as might be mutually agreed on by the contending governments. These were the principal political movements of the last winter. The last campaign opening with a gloomy aspect to the discerning citizens of this state, being destitute of adequate resources, and without any alliance, and that from its local situation to Canada, obliged to encounter the whole force of that province, or give up its claim to independence and run away.

Vermont being thus drove to desperation by the injustice of those who should have been her friends, was obliged to adopt policy in the room of power; and, on the first day of May last, Colonel Ira Allen was sent to Canada, to further negotiate the business of the exchange of prisoners, who agreed on a time and place, and other particulars relating to the exchange. While he was transacting that business, he was treated with great politeness, and entertained with political matters, which necessity obliged him to humor in that easy manner that might serve the interests of this state in its extreme critical situation, and that its consequences might not be injurious to the United States. The plan succeeded. The frontiers of this state were not invaded, and Lord George Germain's letter wrought upon congress and procured that from them which the public virtue of this people could not.

In the month of July last, Major Joseph Fay was sent to the British shipping on Lake Champlain, who completed

an exchange of a number of prisoners who were delivered at Sheensborough in September last, at which time and place Colonel Ira Allen and Major Fay had a conference with the British commissioners, and no damage as yet had occurred to this or the United States from this quarter. And in the month of October last, the enemy appeared in force at Crown Point and Ticonderoga, but were manœuvred out of their expedition, and were returned into winter quarters in Canada with great safety; that it might be fulfilled which was spoken by the prophet: — “I will put my hook in their nose, and turn them back by the way which they came, and they shall not come into this city” (alias Vermont) “saith the Lord.”

It remains that I congratulate your Excellency, and participate with you in the joy of your capturing the haughty Cornwallis and his army, and assure your Excellency that there are no gentlemen in America who enjoy the glorious victory more than the gentlemen of this state, and him who has the honor to subscribe himself your Excellency's devoted and most obedient, humble servant,

THOMAS CHITTENDEN.

His Excellency GENERAL WASHINGTON.

No. VIII.

LETTER

FROM

NATHANIEL CHIPMAN TO ALEXANDER HAMILTON,

OCCASIONED BY

CERTAIN PROCEEDINGS OF THE DEMOCRATIC SOCIETY

OF THE

COUNTY OF CHITTENDEN.

The proceedings of the Democratic Society of the county of Chittenden, which occasioned the following letter, form a document of considerable length, which is not here republished, as its contents would be of little interest to readers of the present generation. They are a strong expression of the democratic doctrines of the time. As some of the positions laid down in it were enforced by quotations from the writings of Judge Chipman, he felt it his duty to address the following explanatory letter to Mr. Hamilton.

LETTER.

Rutland, Vt. January 9, 1794.

DEAR SIR, — You have, undoubtedly, noticed the proceedings of the Democratic Society in the county of Chittenden, in this state. I find they have been published with great avidity in New York and Philadelphia. The founder of that society, and sole author of their late proceedings, perhaps you are apprized, is not an inhabitant of this state, but resides, generally in the city of New York. What could have induced that gentleman to call in the aid of my name or my writings, in support of such proceedings, is best known to himself. If you have not read the work from which the quotations are made, you might be led, from the detached sentences there cited, to believe that it contains the principles of anarchy instead of the principles of government — principles wholly subversive of a representative democracy. If you give yourself the trouble of reading the passages there cited, in their connection, you will find that they have been brought in by the head and shoulders, and with the strength of a Hercules, as a comic writer observes on a like occasion. I have, indeed, in treating of a representative

democracy, asserted that "an interest in the approbation of the people, and a strong sense of accountability to them, in all official conduct is the greatest, or rather the only effectual security against abuses in those who exercise the powers of government."

I have further said, that "to render the public sentiment a more rational and more powerful check upon every department, it is essentially necessary that there be in the constitution of every free state an effectual provision for the dissemination of useful knowledge." That "in a republic, by which is intended a representative democracy, the powers of government are supported, not by force, but by the sentiments of the people;" that "it is necessary to cultivate a sentiment of attachment to the government."

I still believe these sentiments to be just, not in theory only but in practice. Yet I cannot discover that they express, or even remotely imply an approbation of self-created societies and clubs, formed for the purpose of censuring the proceedings of governments *in transitu*, of anticipating the deliberations of constitutional bodies, or dictating the measures which those bodies ought to pursue.

If, sir, you will have the patience to read so long a letter, I will give you my reasons for believing such societies to be not only useless, but dangerous. Simple democracies, in which the people assemble in a body to enact laws, and decide upon public measures, have, from the earliest ages, exhibited scenes of turbulence, violence and fluctuation, beyond any other kind of government. No government has been able to exist under this form for any length of time. Experience has evinced that the people, collected in a body

are impatient of discussion, and incapable of reasoning, but they are highly susceptible of passions. To these the more artful direct their whole attention; by these every decision in the numerous and heterogeneous assemblies of the people at large is irresistibly influenced. In a simple democracy there can be no fixed constitution, everything is liable to be changed by the frenzy of the moment, or the influence of a popular faction. In such a government, when all are immediate actors, no accountability can exist; consequently in no government have there been instances of a more flagrant violation of rights, or a tyranny more cruel and remediless than those which have been frequently exercised over a minority of the citizens or against an unpopular individual.

Such is not the government under which we live. Our national government and the governments of the several states are representative democracies. This kind of government is calculated to give a permanent security to all the essential rights of man, life, liberty and property, the equal right of acquisition and enjoyment in a just compromise with the rights of all which a simple democracy does not. It is designed in its constitution to provide equally against the tyranny of the few and the tyranny of the many.

The people have endeavored to place their delegated rulers in a constant state of accountability. This is the hinge on which American liberty turns. That the most perfect freedom of deliberation might be secured, the members of the legislature are, in their public conduct, made accountable only to the sentiments of the people by the interest which they have in the approbation of their con-

stituents. The executive is made accountable to the public sentiment, and is further amenable to a constitutional tribunal for every violation of trust.

The powers and duties of the several departments are, in many instances, limited by the laws of the constitution, by which the people have said, thus far shall ye go and no farther. Many things are left to their integrity and discretion to act for the best good of the nation.

Congress are, from their situation, furnished with the necessary information relative to the present state of things as they may affect the nation, whether internally or externally. All this is in their debates, handed out and circulated among the people, together with all the reasons for and against any measure that could be suggested by the most mature deliberation. By these means the people have in their power sufficient information to judge calmly and rationally of the measures which have from time to time been adopted. Proceeding in this way, I am persuaded that a representative democracy may secure the most civil and political happiness of any of the kinds of government which have yet existed. Such is the state of things, that knowledge in the complicated affairs of civil society comes not by intuition. The means of information, and frequently diligent investigations, are necessary. The knowledge of the people will follow, but can rarely precede a public discussion. They will generally approve or disapprove with judgment, but, in debating, are exposed to all the rashness of ignorance, passion and prejudice.

Our self-created societies and clubs, as it appears to me, have a tendency, directly or indirectly, to introduce into the

measures of government all the precipitation, all the heat and ungovernable passions of a simple democracy.

Have we reason to believe that these self-pronounced dictators have a freer access to the means of information, that they have been able, more fully, to comprehend the present circumstances, the principles, and reasons which ought to direct public measures, than those to whom the people have confided that task, or even than their more peaceable and quiet fellow-citizens? Certainly they have given us no unequivocal proof of either. Their professed design has been to promote political knowledge, but whenever they have established themselves, they have assumed a dictatorial style in their resolves. When any man or body of men have refused their dictates, or presumed to differ from their opinion, no length of meritorious services, no virtue or integrity of character, have been proof against their bold proscriptions. Like the demagogues of simple democracy, they have appealed wholly to the passions and jealousies of the people. They have assumed to speak the sentiments of the people, though, in point of numbers, they are certainly a very inconsiderable minority. If their assertions have so far imposed on the national government, as to direct their measures, it is worse than the evils of a simple democracy. It is an engine to govern the majority by a minor faction. Nothing of this kind can happen in an assembly of the people at large. Is it, sir, supposed that the measures of congress have, in their present session, been influenced by means of these societies? I should be very unwilling to believe that the American government, which I had supposed to be an improvement upon the wisdom of ages, had

so soon submitted to the control of a few self-authorized oligarchs.

If, however, these societies are unable to dictate measures to the national government, they will still have a very pernicious effect. When once, though under the thickest clouds of ignorance, they have prejudged a measure, and assumed to dictate it, unless they have more candor than most men, their prejudices will rarely come to any light of conviction. This, as far as their influence extends, will, in a great degree, prevent the happy effect of the wisest and best measures. It is, perhaps, of as much importance, in general, that the people should see and acknowledge the measures of government to be wise and good, as that they should be really wise and good. If there is a failure in either respect, they will not secure the happiness of the people.

It is of great consequence that the people, with the means of information, should cultivate a disposition to judge with coolness and impartiality, and that legislators should endeavor to render the reason of their measures plain and intelligible to the common sense of mankind.

I know it is frequently said that, in a republic, it is necessary to the maintenance of liberty, that the people should be jealous of their rulers. But I have never been able to persuade myself, that, to be a good republican, a man must imbibe prejudices which is the necessary consequence of jealousy. That, certainly, is an unfortunate situation, which renders candor dangerous, or jealousy a species of virtue. In no government are rulers held more strictly and generally accountable, than in one representative democracy. Their

continuance in place depends constantly on a faithful discharge of their trust.

Ought we not, then, for a suspicious jealousy to substitute a manly and rational confidence? This, by no means, implies a supine inattention to public men or measures, but it admits candor in the examination. If jealousy be a republican virtue, if it be necessary to excite suspicions among the people, to render them watchful of their liberties, it must be acknowledged that the democratic societies have, in this respect, great merit. They will not, surely, think that the people ought to exempt them from suspicions and jealousies because they are self-existent. Until their time shall come, they may, on these principles, justify any of the most violent and ill-grounded invectives against the members of the federal government, as purely intended to keep alive among the people a necessary jealousy, a wholesome distrust of rulers. If, by these means, the people should be deprived of all the present blessings of government, and the nation plunged into a long series of calamities, they have only to say, all this is the glorious price of liberty. They need not blush for their virulent censures of the executive of the federal government, for an opposition to the measures of a foreign minister — those measures which were disapproved by his nation, and for which he was recalled with pointed marks of disgrace. Notwithstanding what has been observed, I do not mean to insinuate that such associations as our democratic societies are to be animadverted upon by laws, or restrained by the constitution: the exercise of such a power would be more dangerous to liberty than the associations themselves. They must be left to rise or fall solely

by the good sense of the people. Nor would I insinuate that it can never be expedient for the people to assemble to petition for a redress of grievances, whether constitutional or legislative. But it would be well if the petitions and representations of the people, unless when they come from known corporate bodies, were always to be signed individually, that it might be known how far they are expressive of the public sentiment. When they come forward from voluntary societies, there is often a deception. It is not known whether they embrace ten or ten thousand individuals.

From these observations you will be convinced that I am no friend to such societies, and that my name ought not to have been brought forward, as one who favored their principles.

I am, Sir, yours, &c.

N. CHIPMAN.

ALEXANDER HAMILTON, Esq.

THE END.